91-319

No. ——

FILED

AUG 22 1991

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

TOM J. BILLMAN, CRYSOPT CORPORATION, BATTS NECK CORPORATION, and FIRST THROUGH SIXTH BATTS NECK COMPANIES,

Petitioners,

v.

STATE OF MARYLAND DEPOSIT INSURANCE FUND CORP. and COMMUNITY SAVINGS AND LOAN, INC.,

Respondents.

Petition for a Writ of Certiorari to the Court of Special Appeals of Maryland

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether petitioners were deprived of $2,822,267 without due process of law in violation of their rights under the Fourteenth Amendment where the Circuit Court denied petitioners any hearing whatsoever on the issue of relief and entered a default judgment against them on an unliquidated claim in a case in which they had appeared.

PARTIES TO THE PROCEEDINGS BELOW

Plaintiffs

State of Maryland Deposit Insurance Fund Corporation
Community Savings and Loan, Inc.

Defendants

Batts Neck Corporation
Tom J. Billman
Clayton C. McCuistion
Barbara A. McKinney
James B. Deerin, Jr.
First Batts Neck Company
Second Batts Neck Company
Third Batts Neck Company
Fourth Batts Neck Company
Fifth Batts Neck Company
Sixth Batts Neck Company
Epicenter Consolidated Ltd.
EPIC Holdings Ltd.
Crysopt Corporation

Intervenor

William J. Harnett

RULE 29 LISTING

Petitioner Crysopt Corporation is the parent corporation of petitioner Batts Neck Corporation. Petitioner Batts Neck Corporation is the parent corporation of petitioner First through Sixth Batts Neck Companies.

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IN THE

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No. ———

TOM J. BILLMAN, CRYSOPT CORPORATION, BATTS NECK CORPORATION, and FIRST THROUGH SIXTH BATTS NECK COMPANIES,

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Tom J. Billman, Crysopt Corporation, Batts Neck Corporation, and First through Sixth Batts Neck Companies respectfully petition for a writ of certiorari to review the judgment of the Court of Special Appeals of Maryland entered on February 4, 1991.

OPINIONS BELOW

The opinion of the Court of Special Appeals of Maryland (1a-18a) is reported at 86 Md. App. 1, 585 A.2d 238 (1991). The petition for writ of certiorari was denied by the Court of Appeals of Maryland on May 24, 1991 (19a). The decisions of the Circuit Court (20a-55a) have not been published.

JURISDICTION

The judgment of the Court of Special Appeals of Maryland was entered on February 4, 1991. The Court of Appeals of Maryland denied the petition for writ of certiorari on May 24, 1991. This petition is being filed within 90 days of the denial of the petition of writ of certiorari by the Court of Appeals of Maryland.

This Court has jurisdiction to review the judgment of the Court of Special Appeals of Maryland under 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the following constitutional provisions:

U.S. Constitution

Fourteenth Amendment, Section 1

> . . . nor shall any State deprive any person of life, liberty, or property, without due process of law. . .

STATEMENT OF THE CASE

The Complaint, filed on September 26, 1986, alleged that petitioners had engaged in a breach of fiduciary duty by usurping a corporate opportunity in real estate. (66a ¶¶ 17-24; 74a, ¶¶ 53-57; 27a). The Circuit Court below entered a default judgment against petitioners, who had appeared in the case, depriving them of their right as grantors of four deeds of trust to receive $2,822,267 in surplus proceeds from a foreclosure sale of realty, and awarding the $2,822,267 to respondents (20a-23a). The Circuit Court denied petitioners' request for a hearing at which they could present evidence or otherwise contest respondents' right to this relief (34a). Respondents specifically objected in the Circuit Court on the grounds that entry of the default judgment without a hearing on the issue of relief deprived them of their property without due process of law in contravention of the Fourteenth

Amendment of the United States Constitution (28a-29a, 56a-58a). The Circuit Court overruled these due process objections, and entered the default judgment (20a-23a, 34a-35a). Respondents submitted no evidence whatsoever to establish their right to the award of $2,822,267.

Petitioners filed an appeal to the Court of Special Appeals of Maryland, which affirmed the default judgment. The Court of Special Appeals rejected petitioners' due process argument, ruling that there was no reason for the Circuit Court to conduct a hearing prior to entry of the default judgment because "all of the facts necessary to award the equitable remedy were established in the Complaint." (13a). The petitioners filed a timely petition for writ of certiorari with the Court of Appeals of Maryland, and, on May 24, 1991, the Court denied the petition (19a).

REASONS FOR GRANTING THE WRIT

Whether A Litigant Has A Due Process Right Under The Fourteenth Amendment To A Hearing On The Issue Of Relief Prior To The Entry Of A Default Judgment On An Unliquidated Claim Is An Important Question Of Federal Law Which Has Not Been, But Should Be, Settled By This Court

In *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 429 (1982), the Court recognized that "The Court traditionally has held that the Due Process Clauses protect civil litigants who seek recourse in the Courts, either as defendants hoping to protect their property or as plaintiffs attempting to redress grievances." In *Societe Internationale v.-Rogers*, 357 U.S. 197, 209 (1958), the Court held there are "Constitutional limitations upon the power of Courts to enter default judgments depriving litigants of their property." And, in *Klapprott v. United States*, 335 U.S. 601, 611-612 (1949), the Court held "Even decrees of divorce or default judgments for money damages where there is any uncertainty as to the amount must ordinarily be supported by actual proof."

State Courts have recognized that "[A] defaulting party has a due process entitlement to be heard as to the presentation and evaluation of evidence necessary to a judicial determination of the amount of damages." *Buffington v. Torcise*, 504 So.2d 490, 491 (Fla. App. 3d Dist. 1987); *Cole v. Blackwell, Walker, Gray, Powers, Flick & Hoehl*, 523 So.2d 725 (Fla. App. 3d Dist. 1988); *Howard v. Fountain*, 749 S.W.2d 690, 692-693 (Ky. App. 1988). Lower federal courts have held that "[A] default does not constitute an admission of the amount of unliquidated damages or of the propriety of injunctive relief. . ." *In re Uranium Antitrust Litigation*, 473 F.Supp. 382, 392 (N.D.Ill. 1979). *Accord, Securities & Exch. Comm'n v. Management Dynamics, Inc.*, 515 F.2d 801, 814 (2d Cir. 1975).

The instant case squarely presents the constitutional question of whether a litigant, who has appeared in the case, and who has been defaulted on an unliquidated claim, has a due process right under the Fourteenth Amendment to a hearing on relief prior to the entry of a default judgment. The constitutional right to a hearing on the issue of relief in a state court action for a default judgment involves fundamental questions regarding the extent to which the Fourteenth Amendment safeguards litigants from the arbitrary taking of property and property rights. This question is one of broad public import because it concerns the limitations, if any, placed upon state court default judgment proceedings by the Fourteenth Amendment and has not been settled by the Court.

Contrary to the decision of the Court of Special Appeals (11a-13a), the Complaint allegations could not and did not establish the facts necessary for the default judgment. The law is settled that a defendant held liable for the usurpation of a corporate opportunity is entitled to be reimbursed for his investment in acquiring and improving the property or other corporate opportunity. *Faraclas v. City Vending Co.*, 194 A.2d 298 (1963); *Weissman v. A. Weissman, Inc.*, 97 A.2d 870, 872 (1953).

The Complaint only alleged that from 1984 through February 1985, the respondent Community Savings and Loan, Inc. ("Community") loaned money to the petitioner Batts Neck Corporation to acquire and improve realty (66a-68a); and that the petitioner Crysopt Corporation ("Crysopt") bought the stock of the Batts Neck Corporation from Community for one thousand dollars above the property's acquisition and 1986 costs of improvement which "did not reflect the value of the Property as assembled, developed, and appreciated" as of the date of the sale. (68a ¶ 24). The Complaint makes no claim with respect to the alleged fair market value of the property at the time that petitioners acquired it.

The facts relevant to the issues of relief could not have been and were not pled in the Complaint because many of them did not transpire until after the Complaint was filed on September 26, 1986. The Complaint alleges February 1985 as the last date Community loaned any money to the Batts Neck Corporation to improve the property. (68a ¶ 27). The Complaint does not allege or challenge any transaction occurring after May 13, 1985. (69a ¶ 30). There was no fixed or liquidated claim for damages in the Complaint, which, instead, alleged that "Community was injured in an amount to be proven at trial." (59a, at ¶¶ 45, 49, 52, 57, 78, 83 and 98).

The Complaint nowhere alleges that all of the funds invested by the Batts Neck Corporation in acquiring and improving the realty from March 1985 through the time of the default judgment, March 6, 1990, were funds obtained by the Batts Neck Corporation from Community. At a hearing on relief, petitioners would have been able to prove that the property when acquired in 1985 was unimproved farm land having partially renovated and dilapidated buildings on it and that petitioners had invested an additional $2.8 million of their own funds after they acquired the property in February 1985 to improve the real estate and to rehabilitate the structures on the prop-

erty. Petitioner Crysopt Corporation submitted to the Circuit Court two uncontested affidavits by its Controller which established such facts. (28a-29a, 41a-42a). Respondents presented no affidavits or any evidence at all in the Circuit Court. Petitioner's affidavits were not even considered by the Circuit Court because it refused to provide petitioners with the opportunity to be heard on the issue of relief. Thus, because it denied petitioners a right to a hearing on relief, the Circuit Court erroneously and unlawfully awarded respondents more than $2.8 million of petitioners' funds invested in improving the real estate and structures on the property.

It is repugnant to due process for courts to enter default judgments unsupported by any evidence and without affording defendants, who have appeared in the action, a hearing on the issue of relief. The default judgment below unsupported by any evidence and entered without a hearing is an egregious taking of property without due process of law in violation of the Fourteenth Amendment.

CONCLUSION

For all of the foregoing reasons, the Court should grant a writ of certiorari.

Respectfully submitted,

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APPENDIX

APPENDIX

IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 525

September Term, 1990

TOM J. BILLMAN, *et al.*

v.

STATE OF MARYLAND DEPOSIT INSURANCE
FUND CORPORATION, *et al.*

Wilner, C. J.
Bishop,
Cathell,

Opinion by Bishop, J.

Filed: February 4, 1991

This appeal is one of several related cases, each of which stems from the savings and loan difficulties that have plagued Maryland for the past several years. *See, e.g., Billman v. State Deposit*, 80 Md. App. 333 (1989), *vacated and remanded*, 321 Md. 3 (1990). On September 29, 1986, suit was brought by the State of Maryland Deposit Insurance Fund Corporation (MDIF), as Receiver

for Community Savings & Loan, Inc., and Community Savings & Loan, Inc. (Community) against Batts Neck Corporation (BNC), the First through Sixth Batts Neck Companies, Epicenter Consolidated, Ltd., Epic Holdings, Ltd., Crysopt Corporation (Crysopt), Tom J. Billman (Billman) and other individuals who were former officers and directors of Community. The claims against several of the defendants were dismissed so that only BNC, the First through Sixth Batts Neck Companies, Crysopt and Billman remained. William J. Harnett filed a Motion to Intervene which was granted for the sole purpose of contesting the priority of MDIF's judgment against Crysopt. Harnett's claim has been dismissed.

On November 10, 1989, MDIF and Community filed a Motion for Sanctions for failure to provide discovery. The Circuit Court for Montgomery County (Joseph H. H. Kaplan, J., sitting by designation) granted the Motion for Sanctions and ruled, pursuant to Md. Rule 2-433(a), that the facts in the Complaint were deemed admitted and taken to be established and that the defendants were prohibited from opposing plaintiffs' designated claims.[1] An interlocutory order was entered against defendants on the issue of liability. The remedy was determined after a hearing on March 6, 1990, at which a final judgment was entered in favor of plaintiffs. The court ruled, *inter alia*, that Community was entitled to either the property or the proceeds of foreclosure sales in certain cases then pending in the Circuit Court for

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[1] The facts alleged in the Complaint that were deemed to be admitted were more than sufficient to permit the entry of a judgment. These allegations included unfair and unreasonable dealings by the defendants with Community, the obtaining of loans from Community "that were commercially unreasonable, unfair and burdensome to Community", conspiracy in wrongful acts in "knowingly receiving the fruits and proceeds of those . . . acts, and for conversion of the property of Community." It was further alleged that Billman in concert with the others through his positions as officer and director acquired large sums of money contrary to his and their fiduciary duties to Community.

Queen Anne's County, that otherwise would have been paid to the grantors of the deeds of trust. Additional facts will be included in our discussion of the questions presented.

ISSUES PRESENTED

Appellants present the following issues:

I. Whether the trial court erred in granting a default judgment in favor of MDIF as sanction for a discovery violation without a hearing on the issue of damages;

II. Whether the relief granted by the trial court was correct;

III. Whether the trial court erred in denying appellants' motion for summary judgment on the grounds of *res judicata*; and,

IV. Whether the trial court erred in denying appellants' motion for summary judgment under Md. Corps. & Ass'ns. Code Ann. § 2-419 (1985).

I.

On September 29, 1989, appellees noted the depositions of Billman, Crysopt, and the First through Sixth Batts Neck Companies. The depositions were set for November 7, 1989, and included requests for production of documents, including BNC's state income tax returns for 1985 and 1986 which had not been requested previously.[2] On November 6, 1989, one day before the scheduled depositions, appellants filed a Motion for Protective Order That Discovery Not Be Had. The trial court denied the motion and ordered that the depositions proceed as scheduled.

Appellants failed to appear for their depositions and to produce the requested documents. Appellees filed a

[2] In their Motion for a Protective Order, appellants conceded that they had not produced the state tax returns previously, but they objected to the production of the tax returns on the grounds that they were irrelevant and privileged.

Motion for Sanctions requesting that a judgment by default be entered against each of the appellants. After a hearing, the trial court granted the Motion for Sanctions. The trial court ruled that, pursuant to Maryland Rule 2-433(a), the facts in the Complaint were deemed admitted and taken to be established, and that Billman, Crysopt, BNC and the First through Sixth Batts Neck Companies were prohibited from opposing appellees' designated claims. An interlocutory judgment was entered in favor of appellees on the issue of liability and a hearing was scheduled to determine the appropriate remedy.

MDIF requested the court to restore to Community the property, or the right to the proceeds of sale of that property, that Billman acquired during the "reorganization" of Community and its parent company. MDIF informed the court that it was seeking only this equitable relief and would abandon the remaining claims for relief requested in the Complaint. After the hearing on the remedy, the trial court granted the relief sought by MDIF.

Appellants argue that the trial court erred in granting a default judgment in favor of appellees as a sanction for a discovery violation. Specifically, under this first issue, appellants contend A) that the trial court erred in granting a default judgment as a sanction because the deposition was noticed in bad faith and because there was no prejudice to appellees; B) that they were deprived of their constitutional right to a jury trial on the issue of damages; and, C) that they were deprived of due process by entry of a default judgment on the issue of damages. We will discuss each of these contentions *seriatim*.

A.

The trial court granted the default judgment in favor of MDIF pursuant to Md. Rule 2-433(a) which provides:

> (a) For Certain Failures of Discovery.—Upon a motion filed under Rule 2-432(a), the court, if it finds a failure of discovery, may enter such orders

in regard to the failure as are just, including one or more of the following:

(1) An order that the matters sought to be discovered, or any other designated facts shall be taken to be established for the purpose of the action in accordance with the claim of the party obtaining the order;

(2) An order refusing to allow the failing party to support or oppose designated claims or defenses, or prohibiting that party from introducing designated matters in evidence; or

(3) An order striking out pleadings or parts thereof, or staying further proceeding until the discovery is provided, or dismissing the action or any part thereof, *or entering a judgment by default that includes a determination as to liability and all relief sought by the moving party against the failing party* if the court is satisfied that it has personal jurisdiction over that party. If, in order to enable the court to enter default judgment, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any matter, the court may rely on affidavits, conduct hearings or order references as appropriate, and, if requested, shall preserve to the plaintiff the right of trial by jury.

Instead of any order or in addition thereto, the court, after opportunity for hearing, shall require the failing party or the attorney advising the failure to act or both of them to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust. (emphasis added).

In Maryland, "a trial judge has a large measure of discretion in applying sanctions for failure to adhere to the

discovery rules." *Mason v. Wolfing*, 265 Md. 234, 236 (1972). Maryland Rule 2-433(a) clearly provides that entry of a default judgment is an appropriate remedy for a discovery violation. Where the ultimate penalty of a default judgment is invoked, it cannot be disturbed on appeal without a clear showing that the trial court abused its discretion. *Id.*

Appellants maintain that the deposition notices in the instant cases were an attempt by appellees to posture for a default judgment and avoid a trial. Appellants argue that the depositions were not noticed in a good faith effort to undertake discovery since the plaintiffs had already deposed Billman and cross-examined him in a separate but related trial. Appellants also argue that their failure to submit to the depositions in no way prejudiced the ability of appellees to prepare and try their case. Finding no merit in appellants' arguments, we affirm.

The depositions were not noticed in bad faith. Appellees were entitled to avail themselves of all discovery procedures permitted under the Maryland Rules governing civil cases, including the taking of depositions. Maryland Rule 2-402(a) governs the scope of discovery, and it provides:

> (a) Generally.—A party may obtain discovery regarding any matter, not privileged, including the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location of persons having knowledge of any discoverable matter, if the matter sought is relevant to the subject matter involved in the action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party. It is not ground for objection that the information sought is already known to or otherwise obtainable by the party seeking discovery or that the information will be inadmissible

> at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence. An interrogatory or deposition question otherwise proper is not objectionable merely because the response involves an opinion or contention that relates to fact or the application of law to fact.

Appellees sought to question Billman concerning the documents he had already produced. They also sought the two state tax returns which appellants had not produced. Maryland Rule 2-411 states that a party may depose a person for the purpose of discovery or for use as evidence in the action or for both purposes. It is not a ground for objection that the information sought is already known or otherwise obtainable by the appellees. *See*, Md. Rule 2-402(a). Similarly, it is not a ground for objection that the information sought was discovered by appellees in a different civil action. Leave of court to take a deposition is required only in certain limited situations including when an individual has previously been deposed *in the same action*. Md. Rule 2-411. Since Billman had not been deposed previously in this action and, since the discovery sought was clearly relevant, appellees were entitled to conduct discovery pursuant to the Maryland Rules, including the taking of depositions.[3]

Appellants' argument, that the trial court erred in granting a default judgment because their failure to submit to the deposition did not prejudice the appellees, must also fail. The Maryland Rules do not require that a showing of prejudice is necessary to support the entry of a default judgment for failure to comply with the discovery rules. In fact, Md. Rule 2-433(a) clearly provides that once the trial court finds a failure of discovery, it may impose various sanctions.

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[3] This is an unusual and complex case. We do not suggest that depositions should be routinely taken to "acquire" information already known or readily available by less onerous means.

In *Williams v. Williams*, 32 Md. App. 685 (1976), although holding that there was an abuse of discretion, the Court stated:

> As for the circumstances where the "ultimate penalty" may properly be imposed, Chief Judge Hammond observed in *Lynch v. R.E.Tull & Sons, Inc.*, 251 Md. 260, 261, 247 A.2d 286 (1968):
>
> > "There have been suggestions that this ultimate sanction usually will be invoked only where the failure is willful or contumacious [citing cases], but the power of the court to act is not thus limited and there may be other occasions when this *gravest sanction* can properly be invoked." (Emphasis added.)

Id. at 691.

* * * *

> In virtually every case where the ultimate sanction has been imposed, such action has been taken in the presence of contumacious or dilatory conduct on the part of the plaintiff or when the noncomplying party had disobeyed a direct order of the court to depose, or to show cause, to answer interrogatories, or to respond to his opponent's motion for dismissal or default judgment. While the Court of Appeals has held that dismissal or default may be imposed even where a party's failure to comply with a discovery order is neither wilful nor contumacious, *Lynch v. R. E. Tull & Sons, Inc.*, 251 Md. 260, 247 A.2d 286 (1968), *supra*, its ground there for affirming such action by the trial court was principally that appellant had not provided a transcript and "[t]hat which is before us does not permit us to find an abuse of discretion in Judge Shure's actions." 251 Md. at 262.

Id. at 695.

Other cases have similarly held that the "ultimate penalty" of default judgment may be imposed where a party's failure to comply with a discovery order is neither wilful nor contumacious. In *Kipness v. McManus*, 14 Md. App. 362 (1972), we recognized that "the power of the court to invoke the ultimate sanction of dismissal of the action with prejudice or entering a judgment by default against the offending party is not limited to instances where the failure is wilful or contumacious." *Id.* at 364 n. 1. In *Rubin v. Gray*, 35 Md. App. 399, 400 (1977), we stated that "[t]he authority to impose this 'gravest of sanctions' . . . is not limited to wilful or contemptuous failures to answer [interrogatories], but may be imposed for a deliberate attempt to hinder or prevent effective presentation of defenses or counterclaims, or for stalling in revealing one's own weak claim or defense." Finally, in *Berkson v. Berryman*, 63 Md. App. 134 (1985), we ruled that the trial court did not abuse its discretion when it imposed the ultimate sanction for a party's violation of a discovery order even when there were less stringent sanctions available. The power of the court to impose a default judgment is not limited to situations where the failure to comply with a discovery order is wilful or contumacious. *Id.* at 142.

One of the fundamental objectives of Maryland's broad and comprehensive discovery rules is to require disclosure of facts and thereby to eliminate, as far as possible, the necessity of any party going to trial while confused about the facts that gave rise to the litigation. *Rubin v. Weissman*, 59 Md. App. 392, 400-01 (1984); *Klein v. Weiss*, 284 Md. 36, 55-56 (1978); *Williams v. Moran*, 248 Md. 279, 290-92 (1966). Although the court did not explicitly find that appellants were prejudiced, and no such finding was required, appellants' failure to appear for deposition certainly deprived appellees of the opportunity to avail themselves of all the discovery procedures permitted under the Maryland Rules. Appellants' Motion for a Protective Order was denied and the court ordered that the deposi-

tions proceed as scheduled. There was disobedience of this direct order of the court. Based on the foregoing, we hold that the court did not err in awarding a default judgment in favor of appellees as a sanction for a discovery violation.

Appellants contend that they were deprived of their constitutional right to a jury trial on the issue of damages. Article 23 of Maryland's Declaration of Rights [4] clearly guarantees the right of trial by jury only in certain instances. The right is guaranteed 1) when issues of fact exist; 2) in a civil proceeding; 3) in a court of law; and 4) where the amount in controversy exceeds five hundred dollars. It follows then, that where liability has been decided by a default, where there is no issue of fact for a jury to decide and where the only relief requested is equitable in nature, there is no constitutional right to a jury trial and the relief may be determined by the court. *See State Farm v. Schlossberg*, 82 Md. App. 45, 63 (1990).

In Maryland, there is no right to trial by jury in equity cases. *Chase v. Winans*, 59 Md. 475 (1883); *Pennsylvania v. Warren*, 204 Md. 467, 474 (1953). Although for some purposes law and equity were merged by revisions to the Maryland Rules in 1984,[5] the merger was never intended to limit or expand the right to trial by jury in matters of law or to expand the right in equity cases. *See* Committee Note to Md. Rule 2-301 ("The merger of law and equity does not affect the right to jury trial."). "If a claim is brought that historically would have been filed on the law side of the court and a

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[4] Article 23 of Maryland's Declaration of Rights provides:

> The right of trial by jury of all issues of fact in civil proceedings in the several courts of law in this State, where the amount in controversy exceeds the sum of five hundred dollars, shall be inviolably preserved.

[5] Md. Rule 2-301 provides that "[t]here shall be one form of action known as 'civil action.'"

jury trial is properly demanded, a jury will hear the case. Equitable claims will be decided by the court without a jury." *Hashem v. Taheri*, 82 Md. App. 269, 272-3 (1990) *citing* P. Niemeyer and L. Richards, *Maryland Rules Commentary* 125 (1984). In the instant case, the court properly exercised its equity jurisdiction and granted the equitable remedy requested by the appellees.[6]

C.

Appellants argue that they were denied their constitutional right to due process because the court did not conduct a hearing on damages which included the right to present evidence, cross-examine witnesses and hold appellees to their burden of proof. We disagree.

After granting appellees' Motion for Sanctions, the trial court ruled, pursuant to Md. Rule 2-433(a), that the facts in the Complaint were deemed admitted and taken to be established and that appellants were prohibited from opposing appellees' designated claims. The allegations in the Complaint, when deemed admitted, established that, during the time BNC was a subsidiary of Community, it acquired the First through Sixth Batts Neck Companies for the purpose of buying and owning waterfront real estate on Kent Island. During 1984, BNC acquired the following:

February 8, 1984—419 acres (known as Batts Neck Plantation) $2.65 million

March 21, 1984—267 acres (known as Adams Ellis Farms) $533,500.00

October 1, 1984—185 acres (adjacent to above listed properties) $643,000.00

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[6] In their memorandum concerning the remedy, appellees agreed to abandon all other claims for relief if the court restored to Community the assets that Billman acquired during the "reorganization" of Community and its parent company.

At some time prior to May 13, 1985, BNC divided the property into 22 separate parcels. Through a series of transactions, Billman received the stock of BNC and, therefore, the property that BNC owned. Appellees requested "recission of the sale and an injunction ordering the return to Community, among other things, the stock of BNC and the title to the property."

In their Memorandum Concerning the Remedy, appellees stated that subsequent to the filing of the Complaint many of the parcels were sold. The remaining parcels were accurately described in Exhibit 2 to the Memorandum. Four of those parcels were subject to deeds of trust in favor of Community and the rest of the property was unencumbered. Defaults occurred under the deeds of trust and Community foreclosed. In light of the events that occurred subsequent to the filing of the Complaint, appellees stated that it was no longer necessary to pursue all of the originally requested remedies. Rather, they agreed to abandon all other requests for remedies if the court restored to Community the property that Billman acquired during the "reorganization" of Community. The location and identity of the property requested by appellees were not contested.

Where a cause of action is such that the plaintiff is entitled to recover either a fixed or liquidated amount or where the amount of damages is ascertainable by mere calculation, the defendant's default admits his liability for that amount. *Kiersted v. Rogers*, 6 H. & J. 282 (1824). In the case *sub judice*, the plaintiffs were entitled to recover certain property or proceeds from the sale of that property. Since the remedy sought was fixed and easily determined by mere reference to the Complaint, all that was required was for the court to grant the equitable remedy sought. No calculations or further findings of facts were necessary.

Although this case involved an equitable remedy it is similar to cases involving actions for liquidated damages

in that the remedy sought is certain and does not require any further factual determinations. Where an action is for a sum certain and liquidated, no hearing on the issue of damages is required. *See, e.g., Stewart v. Hicks*, 395 N.E.2d 308, 312 (Ind. App. 1979) (where action is for liquidated sum certain no hearing on damages is necessary); *Adolf Coors Co. v. Movement Against Racism & Klan*, 777 F.2d 1538, 1543 (11th Cir. 1985) (judgment of default awarding cash damages cannot properly be entered without a hearing unless the amount claimed is a liquidated sum or capable of being determined mathematically); *M. Clifton Edson & Son v. McConnell*, 404 N.E.2d 692, 693 (Mass. App. 1980) (in absence of account stated annexed or other liquidated sum, it was not appropriate to award default judgment without a hearing).

In *Miller v. Miller*, 70 Md. App. 1 (1987) we stated that "where the relief to which the party obtaining the judgment is entitled *remains to be determined*, the defaulting party has the right to participate in any hearing for that purpose and to present evidence on the issue." *Id.* at 22 n. 11 (emphasis added). In the instant case, all of the facts necessary to award the equitable remedy were established in the Complaint. The location and identity of the property and proceeds from the foreclosure sales were not contested, and there was no element of relief remaining to be determined. Consequently, there was no reason for the court to conduct a hearing and the appellants were not deprived of their constitutional right to due process.

II.

Following the filing of memoranda by the parties and a hearing on the remedy, final judgment was entered on all counts and the court awarded Community the proceeds of the foreclosure sales of the property or, if the foreclosure sales were not completed, then the property

itself. Appellants contend that Community was unjustly enriched because BNC spent its own money to acquire and improve the property. We disagree and explain.

When an officer or director breaches his duty of loyalty to the corporation by usurping a corporate opportunity for his personal benefit, the corporation may claim all of the benefits of the transaction for itself. *Guth v. Loft*, 5 A.2d 503, 510-11 (Del. 1939), *cited with approval*, *Maryland Metals v. Metzner*, 282 Md. 31, 45 n.5 (1978). *See also*, *Faraclas v. City Vending Co.*, 232 Md. 457, 460, 463 (1963); Clark, *Corporate Law*, § 7.1, at 224 (1986). This holds true whether the officer or director spent his personal money or corporate money. *Weissman v. A. Weissman, Inc.*, 97 A.2d 870, 872 (Pa. 1953). When the purchase of property is found to be a usurpation of a corporate opportunity and the corporation's money was used, the corporation is entitled to delivery of the property outright or the entire proceeds of the sale of the property. If, however, the officer or director's personal money was involved, he is entitled to the costs of acquiring the property, upon delivery of the property to the corporation. If the property has been sold, the officer or director's profit is delivered to the corporation. *See, e.g.*, *Faraclas*, 232 Md. at 460 (appellant officer to deliver stock to appellee company upon payment to appellant officer of the purchase price where the trial court found that appellant officer usurped the company's opportunity to purchase its own stock); *Weissman*, 97 A.2d at 872 (the purchase by a corporate officer of a corporate mortgage for his personal benefit was a usurpation of a corporate opportunity and thus extinguished the corporation's liability on the debt and left the corporate officer with no claim against the corporation except for the money he expended to purchase the mortgage); 18B Am. Jur. 2d *Corporations* § 1774, at 627 (1985) (property acquisition which usurps a corporate opportunity is to be transferred to the corporation at cost or, if sold, the profits made are transferred).

The facts set forth in the Complaint demonstrate that the directors and officers of Community caused Community to transfer BNC to Crysopt, and ultimately to appellant Billman, for one thousand dollars above the property's acquisition and improvement expenditures, which was far below the fair market value. The Complaint also demonstrates that BNC was a wholly owned subsidiary of Community, that BNC purchased and improved the property exclusively through loans from Community and that BNC never fully repaid the principle of these loans. The loans by Community to BNC and any payments to Community by BNC were, in essence, a shuffling of money from one Community pocket to another so that it was Community money that purchased and improved the property. Since the only money involved in the purchase and improvement of the property came from Community, it is entitled either to the property or to the entire proceeds from the foreclosure sales.

III.

On November 22, 1985, appellees filed *MDIF, et al. v. Billman, et al.*, Civil Action No. 11073, in which they named seven individual and three corporate defendants, including appellants Billman and Crysopt. The original five count complaint alleged unlawful loans by Community to the EPIC entities and insider partnerships; unlawful payment of dividends by Community and unlawful receipt of dividends by Community's officers and directors; unlawful tax payments by Community to its holding company; and, unlawful payment of fees to its holding company.[7]

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[7] Because this original complaint was not provided in the Record Extract, the contents are compiled from appellees' Second Amended Complaint which, at oral argument, was explained to differ from the original Complaint by the addition of Count VI. This count alleged that individual defendants who were directors of Community caused or permitted Community to spend or loan excessive, exorbitant and unjustifiable amounts of money for director and officer salaries,

On September 26, 1986, appellees filed the instant action, then entitled *MDIF, et al. v. Batts Neck Corporation, et al.*, Civil Action No. 18009, in which they named four individual and ten corporate defendants including all appellants. The Complaint alleged that the defendants improperly operated Community by causing Community to sell its subsidiary, BNC, to one of the defendants on unfair and unreasonable terms and to make loans to BNC that were commercially unreasonable and unfair. Appellees alleged that these actions amounted to various breaches of fiduciary duty, fraud and misrepresentation.

On October 24, 1986, appellees moved to consolidate these cases pursuant to Md. Rule 2-503 [8] on the grounds that all individual defendants and three of the corporate defendants were common to both cases and the remaining seven corporate defendants were owned or controlled by Billman or Crysopt. Also, there were numerous facts and laws common to both cases and thus, it would be in the interest of the parties and judicial economy to consolidate.

Appellants opposed the motion and argued vigorously against consolidation. They contended that the two cases involved "entirely separate and discrete transactions" and that there were no common questions of fact or law. Further, appellants planned to assert different defenses and counterclaims in each case. Appellants asserted that by moving to consolidate appellees were "attempting to pound square pegs in round holes."

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bonuses and perquisites for the individual defendants, which was a violation of the duties of care and loyalty owed to Community.

[8] Md. Rule 2-503 provides in part:

(a) Consolidation.—

(1) *When Permitted.*—When actions involve a common question of law or fact or a common subject matter, the court, on motion or on its own initiative, may order a joint hearing or trial or consolidation of any oral or all of the claims, issues, or actions.

The court did not consolidate the cases. On February 12, 1988, appellees filed a second amended complaint in *MDIF v. Billman* in which they added a sixth count alleging that the directors and officers of Community breached their fiduciary duty by spending Community's money for excessive compensation and prerequisites. *See, supra* note 7. Trial was held and the jury rendered a verdict in favor of appellees and against Billman on all counts and against Crysopt on all but one count. Subsequently, we reversed all of the judgments entered against Billman and Crysopt, *Billman v. State Deposit*, 80 Md. App. 333 (1989), and the Court of Appeals vacated our reversal and remanded. *State Deposit v. Billman*, 321 Md. 3 (1990).

In the case *sub judice*, appellants seek reversal of the default judgment on the ground that the case was barred by *res judicata* because the claims could have been litigated in *MDIF v. Billman*. We hold that appellants are estopped from arguing *res judicata* because it directly contradicts their position in their Opposition to Appellees' Motion to Consolidate. The Court of Appeals, in *Kramer v. Globe Brewing Co.*, 175 Md. 461, 469 (1938), stated the clear rule of law that:

> If parties in court were permitted to assume inconsistent positions in the trial of their causes, the usefulness of courts of justice would in most cases be paralyzed; the coercive process of law, available only between those who consented to its exercise, could be set at naught by all. But the rights of all men, honest and dishonest, are in the keeping of the courts, and consistency of proceeding is therefore required of all those who come or are brought before them. It may accordingly be laid down as a broad proposition that one who, without mistake induced by the opposite party, has taken a particular position deliberately in the course of litigation, must act consistently with it; one cannot play fast and loose.

See also, Ohio and Miss. Ry Co. v. McCarthy, 96 U.S. 258, 267-8 (1878); *Stone v. Stone*, 230 Md. 248, 253 (1962); *Brunecz v. DiLeo*, 263 Md. 481, 485 (1971); 28 Am.Jur.2d *Estoppel and Waiver* §§ 68-9 (1966). Having convinced the court not to consolidate this case with *MDIF v. Billman*, appellants cannot now seek to have it dismissed by asserting that the claims could have been raised and litigated previously.

IV.

Appellants contend that the court erred when it denied their motion for summary judgment on the issue of whether their actions violated Md. Corps. & Ass'ns Code Ann. § 2-419 (1985). The complaint alleged a violation of § 2-419 and because the facts therein are deemed admitted and established and the appellants are prohibited from opposing them, there is no error in the court's denial of appellants' motion for summary judgment.

JUDGMENT AFFIRMED; COSTS TO BE PAID BY APPELLANTS.

IN THE COURT OF APPEALS
OF MARYLAND

Petition Docket No. 50

September Term, 1991

(No. 525, September Term, 1990
Court of Special Appeals)

TOM J. BILLMAN, *et al.*

v.

STATE OF MARYLAND DEPOSIT INSURANCE
FUND CORPORATION, *et al.*

ORDER

Upon consideration of the petition for a writ of certiorari to the Court of Special Appeals and the answer filed thereto, in the above entitled case, it is

ORDERED, by the Court of Appeals of Maryland, that the petition be, and it is hereby, denied as there has been no showing that review by certiorari is desirable and in the public interest.

/s/ Robert C. Murphy
Chief Judge

Date: May 24, 1991

IN THE CIRCUIT COURT
FOR MONTGOMERY COUNTY

Civil Action No. 18009

STATE OF MARYLAND DEPOSIT INSURANCE FUND CORPORATION, *et al.*,
Plaintiffs

v.

BATTS NECK CORPORATION, *et al.*,
Defendants

ORDER AND JUDGMENT

[Filed Mar. 6, 1990]

Upon consideration of Plaintiffs' Memorandum Concerning the Remedy Requested in Connection with the Judgment by Default in Favor of Plaintiffs ("Plaintiffs' Memorandum"), the facts stated in Plaintiffs' Complaint that are deemed admitted pursuant to this Court's Order and Judgment dated February 23, 1990, the memoranda submitted by the Defendants and after a hearing held on March 6, 1990, it shall be and hereby is

ORDERED, this 6th day of March, 1990,

1. For the reasons stated by this Court at the hearing on March 6, 1990 and the reasons stated in Plaintiffs' Memorandum, and based upon the facts stated in Plaintiffs' Complaint, Final Judgment shall be and hereby is entered in favor of Plaintiffs and against Defendants Tom J. Billman, Batts Neck Corporation, First Batts Neck Company, Second Batts Neck Company, Third Batts Neck Company, Fourth Batts Neck Company, Fifth Batts Neck Company, Sixth Batts Neck Company, and Crysopt Corporation on each count in which each such defendant

is named and the following relief is hereby ORDERED AND DECREED:

(a) Community Savings and Loan, Inc. ("Community") is entitled to the proceeds of the foreclosure sales in the following cases now pending in the Circuit Court for Queen Anne's County that would otherwise be paid to the mortgagors of the deeds of trust foreclosed in such cases:

(i) Ronald M. Mucha, Substitute Trustee v. First Batts Neck Company, Case No. CV89-01852 regarding Parcel 1, as described in *Exhibit A*;

(ii) Ronald M. Mucha, Substitute Trustee v. Batts Neck Corporation, Case No. CV89-01851 regarding Parcel 7, as described in *Exhibit B*;

(iii) Ronald M. Mucha, Substitute Trustee v. Batts Neck Corporation, Case No. CV89-01850, regarding Parcel 8, as described in *Exhibit C*;

(iv) Ronald M. Mucha, Substitute Trustee v. Batts Neck Corporation, Case No. CV89-01849 regarding Parcel 11, as described in *Exhibit D*.

(b) In the event that (I) any of the exceptions to the foreclosure sales referred to in paragraph (a) are sustained, (II) any or all of such foreclosure sales are not ratified or are set aside for any reason, or (III) any of the property referred to in the foreclosure proceedings is determined not to be included in the applicable sale or sales, *then* the equity of redemption in and to such property shall be in Community, and Community shall be the owner of such property. Neil J. Dilloff is appointed Trustee for the purpose of executing a deed to confirm the status of title, which deed shall be recorded among the Land Records of Queen Anne's County. To the extent that Community is the beneficiary of the only deed of trust or mortgage on such property, the legal and equitable interests in and to such property shall merge,

and Community shall be the holder of fee simple absolute title to such property. Ronald M. Mucha, as Substitute Trustee under the deeds of trust and Neil J. Dilloff, as Trustee hereby appointed, shall execute a deed to confirm such title, which deed shall be recorded among the Land Records of Queen Anne's County.

(c) Community is declared to be the owner of the 38.68 acre parcel, residual of Parcel 10 of Batts Neck plantation, as more fully described in *Exhibit E* attached hereto, fee simple absolute title to such property is vested in Community, and Neil J. Dilloff is appointed Trustee for the purpose of executing a deed to confirm the status of title, which deed shall be recorded among the Land Records of Queen Anne's County.

(d) Community is declared to be the owner of any other portion of the real property that is not included in the above descriptions but that is now titled among the Land Records of Queen Anne's County in the name of Batts Neck Corporation, First Batts Neck Company, Second Batts Neck Company, Third Batts Neck Company, Fourth Batts Neck Company, Fifth Batts Neck Company, or Sixth Batts Neck Company, and all defendants are permanently enjoined from using, enjoying or conveying any of such property.

2. In addition, upon consideration of MDIF's Legal Memorandum on the Issue of Priority Over the Judgment of William J. Harnett Against Crysopt Corporation ("Plaintiffs' Priority Memorandum"), the Memorandum in Support of William J. Harnett's Priority of Judgment Over the State of Maryland Deposit Insurance Fund Corporation Against Crysopt Corporation, and after a hearing held on March 6, 1990, it shall be and hereby is ORDERED, for the reasons stated by this Court at the hearing on March 6, 1990 and those stated in Plaintiffs' Priority Memorandum, that the judgment in favor of Plaintiffs in this action shall have priority over any other judgment lien obtained by Mr. Harnett on Crysopt Cor-

poration's real or personal property, without need for further perfection or execution thereon. Therefore, Final Judgment shall be and hereby is entered in favor of Plaintiffs and against Mr. Harnett on this issue.

3. All other requests for relief and requests for awards of damages set forth in the Complaint, to the extent that they are inconsistent with the relief set forth in this Order or not established by the facts in the record, have been withdrawn by the Plaintiffs, without prejudice, and, therefore, this is the final judgment in this action.

4. A copy of this Order and Judgment shall be recorded among the land records of Queen Anne's County, Maryland.

5. All open costs shall be paid by the Defendants.

/s/ Joseph H. H. Kaplan
JOSEPH H. H. KAPLAN
Circuit Court Judge

IN THE CIRCUIT COURT
FOR MONTGOMERY COUNTY

No. 18009

STATE OF MARYLAND DEPOSIT INS. FUND CORP., *et al.*,
Plaintiffs

v.

BATTS NECK CORP., *et al.*,
Defendants

Baltimore, Maryland
March 6, 1990

The above-entitled matter came on for hearing *via telephone*, before the Honorable Joseph H. H. Kaplan, Judge.

PARTICIPANTS

On Behalf of the Plaintiffs:

JONATHAN SMITH, ESQUIRE
NEIL J. DILLOFF, ESQUIRE

On Behalf of the Defendants:

ROBERT M. DISCH, ESQUIRE
WARREN K. RICH, ESQUIRE

March 6, 1990

PROCEEDINGS

THE COURT: Judge Kaplan here.

MR. DILLOFF: Dilloff and Smith here.

MR. DISCH: Bob Disch here, Judge.

THE COURT: Is Mr. Harnett's attorney on?

MR. RICH: Yes, I am on.

THE COURT: Warren Rich or Mr. Couper?

MR. RICH: Warren.

THE COURT: All right. Hi, Warren.

The hearing is on of course the issue of damages and the issue of priorities.

MR. DILLOFF: Your Honor, this is Dilloff. Do we have a transcript, a court reporter there taking all this down?

THE COURT: Yes, there is a court reporter, Barbara Dobson, the Deputy Chief—you really rate—who is listening to the speaker phone here and taking it down.

MR. DILLOFF: Thank you.

THE COURT: It might be helpful when you say anything to announce who you are.

MR. DILLOFF: We don't have to stand up, do we?

THE COURT: I don't care if you are laying flat on the floor.

The hearing is on those two issues and as you know, I granted a default judgment based on all of the claims that MDIF made, claim for relief, including theft of corporate opportunity, and I would like to hear from all of you on the issue of theft of corporate opportunity and why that is or is not an appropriate form of relief in this instance.

MR. SMITH: Your Honor, this is Jonathan Smith for the plaintiff.

As you just said, the order that you issued on January 30 and in writing on February 23, orders that all of the facts alleged are now being proven, and I believe that these facts establish that Mr. Billman through Batts Neck Corporation and the Batts Neck—first through six Batts Neck companies, devised a scheme to take assets that were within Community Savings and Loan, the Batts

Neck Estate, and place it in his personal domain. And to make matters worse, he used Community's money to do it. So that those actions violated obligations that he owed to Community and constituted a diversion of a corporate item that Community had, and Mr. Billman orchestrated all of this through loans and through means set forth in detail in the complaint.

So it is clear that Community Savings and Loan, based on Your Honor's previous ruling, is entitled to a remedy, and we believe that remedy is the one set forth in Exhibit Two to the memorandum that we recently submitted to the court?

THE COURT: What is that, the proposed order?

MR. SMITH: That is correct.

And, Your Honor, I think the goal is clear, and that is for Community Savings and Loan to have the benefit of these assets returned to Community. That will maximize the recovery and minimize the cost to the receivership.

And we have contracts in place to sell the property for three and a half million dollars plus interest, 12 percent, in August of 1989. and the sale that came out of the proposed foreclosure procedures are ratified, proceeds in excess of 2.8 million dollars will be generated, and we believe Community is entitled to that money. If the sales are not ratified, the receiver believes that the property will not bring as much at another sale, particularly in light of the fact that with interest there is over 3.7 million dollars owed. So we think that it is in the best interest of the receivership to keep the mortgage in place and proceed with the foreclosure while Community keeps the sales proceeds.

The next question is whether or not we are entitled to that remedy under many of the causes of action that have been alleged, and we think the answer is yes to that question.

Your Honor, as you know, Community and MDIF requested equity relief including a general request for relief, and this Court has broad discretion to fashion any

remedy that reflects the current circumstances, not those in existence when the complaint was filed. So we are prepared to abandon the other relief, if the court is inclined to grant the request we requested as set forth in Exhibit 2.

Under the corporate opportunity doctrine and the other cause we have alleged, we are entitled to the remedy that we seek.

One of the arguments made at the January 30 hearing by Mr. Disch as I recall that Community was not harmed because the Batts Neck Company or Crysopt or Billman, whoever, paid back some of the money that they got from Community to begin with. Well, Your Honor, I think that argument is beside the fact, because it does not make much sense for them to be able to argue that they paid back some of the money when they got the money from Community Savings and Loan in the first place and were able to hold this property and it appreciated in value, they paid back some of the money to Community, but not the rest of money. So I think they will want to be able to take the money from Community, get the benefit of the assets over a period of years, pay back some of the money, not pay back the rest. But now if the property be sold, be able to take the benefit of over 2.8 million dollars out of this scheme that Mr. Billman devised. I think that is the type of situation that the corporate opportunity doctrine was designed to avoid, and we believe that the remedy we requested as set forth in Exhibit 2 is an appropriate one here.

The last question to be answered is whether we need an evidentiary hearing in front of a court or jury to get the relief that we seek, and I think the answer to that question is no, because the facts have already been deemed proven that are set forth in this complaint, and there is nothing left to do.

If the plaintiffs are willing to abandon their request for damages, there is nothing to put before a jury, and the only relief that remains equitable this court has the

power to grant and there is nothing more to be said. I can accept that we have to make sure we have identified the property properly, and I think through the affidavit that we submitted through Mr. Levine described the property in detail, and I don't think there is anything left to do, Your Honor, other than sign the order we have submitted. That is all I have to say.

THE COURT: Mr. Disch, can I have your response?

MR. DISCH: Yes, Your Honor, just as a preliminary matter, I would like to thank you for joining us by telephone.

With regard to what Mr. Smith has said, Your Honor, I would like to point out that the order that MDIF submitted I believe is identical to the order that they submitted previously, and that the court did not sign. The court ruled that it was not appropriate because of the consideration of the property, and I believe that is the law in the case and whether MDIF choses to call it constructive trust or not, just because they don't put that label on it that does not mean that it is not constructive trust. I believe it is.

As far as damages, Your Honor, here we are months and months in the case, and MDIF has not submitted a single affidavit on damages. Not only they have not established that community was damaged, I think if they could they would have done so by now. And their affidavit establishes that there are no damages. Millions of dollars were paid in consideration for the property. Batts Neck not only paid back the mortgage, and that money did not come through any savings and loan with regard to paying back the unsecured loan, Batts Neck paid interest on the mortgage.

But MDIF would have to pay back the entire amount received on the property, and pay Batts Neck the amount they received on the property. If you rescind the transaction you cannot keep the proceeds and take the property back. You have to repay that which you received, and I don't think MDIF can establish any damage, and that is why reccession is improper.

The injury is making Community whole for any injuries it suffered and MDIF has not submitted a scintilla of evidence that there has been any injury. They have to present some evidence of damage in order to get default judgment, and MDIF has not done that yet, and I don't believe can do that yet.

THE COURT: Anything else?

A. I am just looking at my notes.

No, Your Honor. That is my argument.

MR. RICH: Your Honor, this is Warren Rich, can I say something?

THE COURT: Yes, certainly.

MR. RICH: If you look at count five which is this corporate opportunity count and you read paragraph 55, the two points I make are this. There are no damages proven, as Mr. Disch has indicated, but more importantly that cause of action or that claim in count five is absolutely inconsistent with the proposition that somehow the fruits of a foreclosure sale were omitted at this point. That is inconsistent. I don't mean—what could they want, the cake and want to eat it, too? On one hand they are saying let's put aside the transaction; on the other they are saying the transaction was great for community now, since the property was sold at foreclosure, and we will go ahead and take the money. And those things are directly inconsistent.

THE COURT: Are you going to address the priority while you are talking? Then Mr. Smith can respond to both of them at the same time, or Mr. Dilloff.

MR. RICH: All right, Your Honor.

With respect to the priority, I think that the statute is fairly clear and I think that I have a tough time arguing, a very difficult time arguing that the statute, putting aside the United States Constitutional issue, the constitutional issue, I think I have a difficult time arguing that the statute did not apply with respect he to the real property. We talk about the bad actor theory, contributing to the loss of institution, we believe that Crysopt was

a passive party, not contributing and was not an active wrongdoer. I say that in all candor, but this is an unclear statute that—I read through Geiger versus Pearson and the case that came before. There is not a question of law, this could interfere with a vested right, something where there has been a judgment and levy that personally levied upon by my client. Under the Geiger proposition the act is clearly unconstitutional.

MR. DILLOFF: This is Dilloff.

THE COURT: I didn't think, Neil, that you would be able to keep quiet that long.

Mr. Rich said on the remedy question, it seems to me that this all boils down to, based on what Mr. Rich said, whether or not this court thinks that section 10-120 of the Financial Institution Article of the Maryland Code is constitutional or not, and obviously they believe that it is.

(COUNSEL:) They even doubt that, in all candor.

THE COURT: Well, the constitutionality issue has been raised before, in the almost five years of the savings and loan crisis, and it has been raised before and I have ruled on it before, and I have ruled that it is constitutional, and thus far no appellate court has said anything different.

MR. RICH: I didn't know an appellate court had ruled on it.

THE COURT: I am saying thus far, as far as I know, and there have been a number of decisions of the court of appeals, because that is where the cases go directly to. In no case has the court of appeals said—and we have operated under this statute for almost five years. Never has the court of appeals said that it is unconstitutional.

Did you hear what I said?

MR. RICH: Your Honor, I didn't know that the court of appeals had ruled on it.

THE COURT: I don't recall any specific rulings, but there has not been any question that they have decided which would have been a determination that the statute is unconstitutional, and they have decided a number of

cases under the statute, including the Chevy Chase case, as far as the reserves were concerned, and you know, the reserve fund and the insurance fund, that was one of the first major decisions under the statute. It has been, you know, and I have ruled specifically—

MR. RICH: I am aware of that, Your Honor, and I don't want to misrepresent anything to the court. I did not know that, and my research has been thorough. I don't think the court is indicating that there has been a ruling on this issue, are you?

THE COURT: No, but I am saying that I have ruled on it several times.

Let me hear from Mr. Dilloff or Mr. Smith on a response on the corporate opportunity judgment or the priority issue, other than the constitutionality issue.

MR. RICH: Can I just ask one question?

THE COURT: Yes.

MR. RICH: Is Mr. Smith or Mr. Dilloff claiming that there is a priority that has been ruled upon?

MR. SMITH: The answer is yes, and I don't think that issue is before the court at this hearing. That is the subject of a separate lawsuit, but we claim priority on personal and realty pursuant to the statute.

MR. RICH: I figured you would take that position.

MR. SMITH: We took that position in Queen Anne's County, and still maintain that position.

THE COURT: And that case has been assigned to me. Judge Sause did not feel that it was appropriate for this court to be deciding this matter and he to be deciding the other matter and thought that it should be under the same person and wanted it sent to me, and that is why I have been designated.

MR. RICH: Will there be an order on the ruling on the objection, Your Honor?

THE COURT: I have ruled that it is appropriately before me and I have been designated to handle it, and it is with complete concurrence of Judge Sause.

Okay, let's go back—that issue is not before me, the foreclosure proceeding is not before me today.

Let's go back to the question of the appropriateness of the judgment that plaintiffs desire, and that is that based on the corporate opportunity doctrine that I award the proceeds of the sale if the sale is ratified, and if not that they get the land, get the real estate.

Mr. Smith, do you want to respond to Mr. Disch or is Mr. Dilloff going to respond to Mr. Disch or Mr. Rich?

MR. SMITH: Your Honor, this is Smith, and I will respond to what both of them said.

I think they both said that there is no evidence that there has been any injury to Community Savings and Loan. I don't think anything could be further from the truth. Community Savings and Loan had a right to have this asset Batts next estate. Mr. Billman took it through the scheme set forth in the complaint. The injury to Community Savings and Loan as the facts have developed is that this piece of property is now worth more than it was worth when Billman took it. Community Savings and Loan is entitled not only to have this money repaid but is entitled to have all of the benefits of the assets that Mr. Billman took. It is not a defense for Mr. Billman to say well I was a smart guy and I took this property and maybe I put some money into it which by the way I got from Community Savings and Loan and I was able to pay off some of the parcels and repay some of the loan, but gosh I can't repay all of the loan, but having said all that, I am still entitled to have these foreclosure sales go through and walk away with 2.8 million dollars while I am hiding in Europe or other parts unknown trying to avoid arrest, and Community Savings and Loan is left holding the bag, which happens to be empty.

That is not the law, Your Honor. The law is that when someone is in violation of the corporation that they were directing officer and controlling shareholder of, takes advantage of that corporation that the assets and all of the benefits have to be restored, and that is true

even if there is profit which is traceable to the wrongdoer's efforts. As I said before, Your Honor, there is good reason for that policy. This case is a good example of it.

Mr. Disch says that Batts Neck sunk a lot of money to improve this property, but the plaintiff says the facts are deemed to be proven and admitted that the money Batts Neck got to acquire and improve this property came from Community Savings and Loan, and if they sold off some and were able to repay some of the loan that is nice, but that does not carry the day for the defendant. And I think we are entitled to have the remedy that we seek granted by the court.

MR. DISCH: Your Honor, Mr. Disch. First of all, I think everything Mr. Smith said is an evidentiary issue. If I were to take a piece of land worth $5000 and build a Marriott Hotel on it, the company that gave me the money may be entitled to the value of the land back. And Mr. Smith did not address the allegation that Community would have to prove at trial, no evidence on which the court can base a judgment, and they have not done it yet.

THE COURT: Okay.

Mr. Smith, are you going to address the non-constitutional aspect of the priority issue?

MR. SMITH: Your Honor, Mr. Dilloff is well versed on that issue.

MR. DILLOFF: Just briefly, Your Honor, simply stated, Crysopt is contributing to a loss of a member association. As a result of that a MDIF judgment which we have in this case, MDIF and Harnett have judgments both against Crysopt.

Pursuant to Section 10-120(D-1) a judgment obtained by MDIF shall have priority over any other judgment or lien on a defendant's real or personal property without need for further perfection or execution thereon. Accordingly, in a situation where MDIF and Harnett both have

judgments MDIF's judgments pursuant to the statute have priority, and accordingly it is our position that if the court should grant us this remedy in furtherance of the judgment which we already have, that in light of the sale in this situation MDIF has total priority and there is nothing left for Harnett to get. It is ironic that Harnett will obtain the money that is going to MDIF, but as far as I am concerned that is totally irrelevant.

There are several other reasons why they are priority also, but it seems to me that the statute especially with Mr. Rich's concessions is clearly dispositive of the issue.

(COUNSEL:) Well, I don't like to argue the opposite.

THE COURT: Is there anything else gentlemen?

(COUNSEL): No, sir.

THE COURT: Okay.

I have reviewed the file and the memos, and I am satisfied that the remedy that the plaintiffs are entitled to is argued by Mr. Smith. Either the funds from the foreclosure sale, all of the funds from the foreclosure sale, if the sale is ratified, and if it is not, if the exceptions are sustained and the sale is not ratified, they are entitled to the real property. And I say that because, at least to my understanding of the theft of corporate opportunity doctrine, it makes no difference that the wrongdoer did something, paid some money to improve the value of the opportunity involved. So that even if Mr. Billman put money into the project after he improperly took it from Community, it makes no difference.

In short, it would be a strange doctrine if it rewarded the thief just because he did some good thing after he did the really bad thing to begin with.

There does not have to be any evidentiary hearing. It is a simple determination. Every benefit that came from the wrong doing has to be turned back to the victim of the wrong doing, and here you are talking about foreclosure proceeds in excess of 2.8 million dollars, or if the sale is not ratified, the specified real estate.

So for all of those reasons and the reasons as probably with greater clarity pronounced by Mr. Smith, I will sign an order, Exhibit Two, giving the plaintiffs the remedy he has requested in Exhibit 2.

As far as the priorities are concerned, as I said, on the constitutional issue, I have found the statute to be constitutional, and the priority is not eliminated because of any unconstitutionality.

As far as the argument about Crysopt being a passive entity in this whole thing, it was the tool that the wrongdoer used to accomplish the wrong doing, and it has certainly contributed to the damage suffered by the plaintiffs. So that argument does not fly with me. And there being no unconstitutionality of the statute, and Crysopt having contributed to the loss or the damage, I will rule that the plaintiff has the priority set forth in the statute to the personal or real property.

(COUNSEL): Personal and real property?

THE COURT: I said it would be the personal or real property.

Accordingly, I will sign the order and judgment which appears as Exhibit 2. There is an accurate description of the real property involved attached to that order. You all have a copy of Exhibit 2, and this is not a criminal case, so I don't have to advise you of your appellate rights.

Somewhere down the line, we are going to have to have a hearing on the exceptions to the foreclosure sale, and—

(COUNSEL): Your Honor, why don't we talk about that while everybody is on the line.

THE COURT: When will it be convenient for everybody.

MR. DISCH: Your Honor, this is Mr. Disch, I have a trial on Thursday in Federal Court.

THE COURT: Well, it does not have to be this week. It can be within the next couple of weeks when it is convenient for everybody.

MR. DISCH: I can do it March 26, 27, 28.

THE COURT: Who is talking?

MR. DISCH: This is Mr. Disch.

THE COURT: All right. How about the 29th of March? How does that sound to everybody.

MR. DISCH: Is that a Friday, Your Honor?

THE COURT: That is a Thursday.

MR. DISCH: That is fine with me, Your Honor.

(COUNSEL): I have a trial in Baltimore County scheduled to start on the 26th. I think it will be done on the 28th. If that trial carries over, can we do it on the 30th?

THE COURT: All right. Why don't we figure 9:30 a.m. Either on the 29th or the 30th, and you let me know which of those two days everybody prefers it on.

I will put it tentatively for 9:30 on the 29th. If you have a problem with the trial we will put it over on the 30th.

(COUNSEL): Your Honor, the order that you are signing, do you know when that will be docketed in Montgomery County?

THE COURT: Well, I would assume that Mr. Dilloff or Mr. Smith will send a messenger over here this morning and they can hand carry it over to Rockville, if that is their desire.

(COUNSEL): Yes, Your Honor, that is what we would like to do.

THE COURT: Okay. I am signing it right now, so it is available for your picking up and filing in Rockville today.

Thank you all.

(Whereupon, the proceedings were adjourned).

IN THE CIRCUIT COURT
FOR MONTGOMERY COUNTY

Civil Action No. 18009

STATE OF MARYLAND DEPOSIT INSURANCE FUND CORPORATION, *et al.*,
Plaintiffs

v.

BATTS NECK CORPORATION, *et al.*,
Defendants

ORDER AND JUDGMENT

Upon consideration of Defendants' Motion to Dismiss, or Alternatively, for Summary Judgment (filed December 2, 1986), Defendants' Motion for Summary Judgment (on res judicata grounds) (filed November 27, 1989), Plaintiffs' Motion for Sanctions (filed November 10, 1989), and William J. Harnett's Motion to Intervene (filed January 10, 1990), responses and replies thereto, and after a hearing held on January 30, 1990, it shall be and hereby is

ORDERED, this 23rd day of February, 1990, that:

1. Plaintiffs' Motion for Sanctions shall be and hereby is GRANTED. The sanction imposed on defendants Tom J. Billman, Crysopt Corporation, Batts Neck Corporation, First Batts Neck Company, Second Batts Neck Company, Third Batts Neck Company, Fourth Batts Neck Company, Fifth Batts Neck Company and Sixth Batts Neck Company is that, pursuant to Maryland Rule 2-433(a), the facts in Plaintiffs' Complaint shall be deemed admitted and taken to be established, and these defendants shall be prohibited from opposing Plaintiffs' designated claims.

2. An interlocutory judgment shall be entered in favor of Plaintiffs and against all Defendants on the issue of liability with the issue of the appropriate remedy to be determined by this Court at a hearing on March 6, 1990 at 10:00 a.m. MDIF and all Defendants shall submit their briefs on the issue of the appropriate remedy on or before February 27, 1990.

3. Upon such determination, final judgment shall be entered in favor of plaintiffs for the remedy as determined by the Court.

4. Plaintiffs' request for the imposition of a constructive trust in Plaintiffs' Motion for Sanctions shall be and hereby is DENIED, pending a further hearing in this matter as discussed above.

5. Defendants' Motion to Dismiss or Alternatively, for Summary Judgment and Defendants' Motion for Summary Judgment (on res judicata grounds) shall be and hereby is DENIED.

6. William J. Harnett's ("Harnett") Motion to Intervene shall be and hereby is GRANTED for the sole purpose of contesting the priority of MDIF's judgment herein against Crysopt Corporation. Pursuant to this Court's order at the hearing of January 30, 1990, MDIF and Harnett shall submit their briefs on the issue of priority on or before February 13, 1990. A hearing on the issue of priority involving Harnett and Plaintiffs shall be held at 10:00 a.m. on March 6, 1990.

/s/ Joseph H. H. Kaplan
Circuit Court Judge

IN THE CIRCUIT COURT
FOR MONTGOMERY COUNTY

No. 18009

STATE OF MARYLAND DEPOSIT INS. FUND CORP., *et al.*,
Plaintiffs

v.

BATTS NECK CORP., *et al.*,
Defendants

Baltimore, Maryland
January 30, 1990

The above-entitled matter came on for hearing before the Honorable Joseph H. H. Kaplan, Judge.

APPEARANCES

On behalf of the Plaintiffs:

JONATHAN SMITH, ESQUIRE
NEIL J. DILLOFF, ESQUIRE

On behalf of the Defendants:

ROBERT M. DISCH, ESQUIRE
BRETT L. ANTONIDES, ESQUIRE
WARREN K. RICH, ESQUIRE

January 30, 1990

PROCEEDINGS

THE COURT: State of Maryland Deposit Insurance Fund Corporation, as receiver for Community Savings and Loan, Inc., and Community Savings and Loan, Inc., versus Batts Neck Corporation, Tom J. Billman, Clayton C. McCuistion, Barbara A. McKinney, James B. Deerin, Jr., First Batts Neck Company, Second Batts Neck Company, Third Batts Neck Company, Fourth Batts Neck Company, Fifth Batts Neck Company, Sixth Batts Neck Company, Epicenter Consolidated, Limited, Epic Holdings, Limited, and Crysopt Corporation.

We have plaintiffs' motion for sanctions; defendants' opposition to motion; deferdants' motion to dismiss, or alternatively, motion for summary judgment; defendants' motion for summary judgment on the ground of res judicata; plaintiffs' responses; motion to intervene filed by William J. Harnett; and opposition to motion:

Let's take them in that order.

Mr. Dilloff, that is your motion for sanctions, so I will hear you on it, then the opposition to it.

MR. DILLOFF: Thank you.

Neil Dilloff for the State of Maryland Deposit Insurance Fund.

Your Honor, the facts with respect to the motion for sanctions are very simple, and not contested, and simply stated, they are that during the period of discovery pursuant to Your Honor's order, Mr. Billman's, Crysopt's, and the various companies that you have enumerated, depositions were noted by MDIF. The day before they were to take place I received letters from counsel for them indicating that they would not appear. At the same time, the motion for protective order was filed at the eleventh hour, which Your Honor denied, and an order was issued requiring the deponents to appear, and they did not.

In addition, there is an important aspect of the failure to appear, and that is that Mr. Billman is a fugitive.

And I happen to have with me here an indictment that was returned and filed today against Mr. Billman, which I will give to counsel.

MR. DISCH: I have one, thank you.

MR. DILLOFF: Obviously, no surprise.

It is absolutely clear that Mr. Billman, the sole director, officer and shareholder of Crysopt and various other entities, will never appear for deposition, neither will his corporate entities, and there is no suggestion made in the papers that he ever will.

Accordingly, because he is the most important person in this case, it seems to me that he would not appear for a trial subpoena, and more fundamentally, he has disobeyed a direct order of this court to appear, as well as the companies. And the cases are legion that when someone disobeys, especially, and there is no possibility that he would appear for deposition, that sanctions such as requested here are appropriate, and accordingly we would like the court to enter judgment by default and sanctions for failure to make discovery, number one, and failure to abide by Your Honor's order, number two, and impose constructive trust on the proceeds of any sale of the Batts Neck Plantation, which is the subject of this particular lawsuit.

Thank you.

THE COURT: Yes, sir.

MR. DISCH: Robert Disch.

Your Honor, I think that there are at least four reasons a default judgment is inappropriate.

In the first place, the first reason is that default judgment cannot be entered in the absence of an evidentiary hearing, and I would submit to you that the record, the facts contained in the affidavit of Lisa Brown filed herewith indicate that there are no damages. Community advanced $4,529,633.26, and was repaid $1,783,280 and received mortgage notes for $3,196,917. So Community received a total of $4,980,197.57, and in effect received a premium over and above, in the amount of $450,264.

Here they are seeking constructive trust. You would normally have a constructive trust when something is transferred with no consideration, and you have a constructive trust because the persons who hold the property did not pay anything for it. Here Community received the proceeds of the transfer, and there is no evidence of any damages in the case.

In addition, Your Honor, I don't believe that the plaintiffs have established any prejudice to justify the severe sanctions of a default, which is the ultimate sanction available with the court.

The depositions were noted for nine depositions in a 70-minute period, each to run five or ten minutes. Plaintiffs knew that Mr. Billman would probably not appear. Each notice contained a document request, and the uncontroverted facts are that we provided all documents responsive to the document request served in this case, including those attached to the deposition notice. That is not controverted, Your Honor.

There are many other available witnesses who have knowledge of the transaction, who they have not attempted to depose, including Barbara McKinney, Mr. Deerin, Mr. Faulkner, nor Lisa Brown, the person who filed the affidavit establishing the money going back and forth.

In our papers, Your Honor, we stipulated, and would stipulate to the authenticity of the documents at trial, which we have produced. So MDIF has not been prejudiced in that regard.

Also, Your Honor, this case has to be viewed with an eye toward the foreclosure proceeding pending in Queen Anne's County where they will be conducting a trial February 13 to decide whether or not to conduct the foreclosure sale. If the sale is ratified the price is reported 3.5 million dollars, so that would throw off a surplus of $2,878,470. MDIF submitted no evidence that Community was damaged in that sum and there is nothing upon which to base a default judgment.

Also, Your Honor, I think Mr. Billman is the target of—now that he is under indictment, which I was not aware until today, he clearly has a fifth amendment privilege not to testify, and had he appeared at the deposition, would not have given anything other than his name.

Thank you, Your Honor.

MR. DILLOFF: Briefly, Your Honor, we don't need a damage hearing. We are asking for the imposition of constructive trust which is equitable relief.

We don't have to show prejudice or that we have to depose others, and if Mr. Billman wants to take the Fifth Amendment that is fine, but none of these arguments addresses the disobedience of a court order. Still we have not heard that he will show up. And in cases less grievous than that judgment by default has been granted, and we ask Your Honor to grant the relief.

MR. DISCH: Your Honor, Judge Mc Kinnon ordered Mr. Billman to appear and he refused, was held in contempt, and took an appeal, and the Court of Special Appeals and Appeals stayed that contempt order.

I also find it surprising that MDIF would say it does not have to show prejudice, and can obtain the ultimate sanction of the default without establishing prejudice.

Constructive trust, Your Honor, is a remedy reserved for situations where a transfer is made without consideration. But here there should be an evidentiary hearing as to what portion of the property, if any, should be returned because the consideration was inadequate.

THE COURT: Mr. Rich, do you have any comment on that?

MR. RICH: Yes, Your Honor, I have a comment.

There has been a lot of jumping here. You can see my independent interest, not consistent with what either party has said.

The first jump I see is in the papers filed by MDIF asking for sanctions and constructive trust with no reasons given in any of those papers for the granting of such extraordinary relief.

Secondly, most important to my client, perhaps the sanctions should go to Mr. Billman. There is a significant jump from Mr. Billman to Crysopt or other corporations. If the court would grant sanctions, there is one thing with respect to Mr. Billman, but without an evidentiary hearing and certain factual determination, it is another thing to do it against any and all corporations, particularly Crysopt.

The third thing is that it appears that MDIF has attempted to circumvent the basic intent of 10-120 of the institutions article. This is clearly an end run in order to gain a priority position against someone who essentially has a judgment and an established lien. This is purposely and intentionally an end run against that section of the law, and there is not even a basis or facts pled to support that type of extraordinary relief.

THE COURT: The court has reviewed the motions and the opposition thereto, and heard argument on all sides, and I believe that MDIF is entitled to sanctions against Mr. Billman. I don't believe that the sanction that is appropriate is constructive trust.

There is no evidence that property is being transferred without adequate consideration. In fact, the consideration, any evidence there is, the consideration is adequate and fair. So that isn't an appropriate remedy in any case.

However, I do believe that Mr. Billman has failed to comply with discovery, that MDIF is entitled to sanctions, and the sanction that I will impose is that he will not be allowed to defend against the claims against him and the others, so that their allegations against him will be taken as proven, and judgment will be entered against him in accordance with those allegations.

Now as far as defendants' motion to dismiss or alternatively for summary judgment, those will no go forward because of my ruling on the plaintiffs' motion for sanctions, but on the additional ground that there is no basis for summary judgment in this case or a motion to

dismiss, because if there wasn't the judgment on the motion for sanctions, there certainly would be disputed material facts in the matter, and neither side would be entitled to summary judgment.

So that the only thing we are left with really is William J. Harnett's motion to intervene. I am not sure that, based on my ruling on the previous motions, that there is any need for Mr. Harnett to intervene, since I have not imposed constructive trust, which was evidently his greatest fear.

But, Mr. Rich, if you feel that there is a need for me to rule on it, I will do so.

MR. RICH: Your Honor, I don't know. I would confess to you that I don't know. If you are granting judgment against Mr. Billman, and if that judgment transcends over to Crysopt Corporation and ipso facto there is a judgment without a hearing and without a trial with respect to Crysopt, then perhaps there is reason for us to intervene. If in fact the case is the opposite, which I think it is, then I agree with the court.

I don't know the answer to question number one.

THE COURT: Mr. Dilloff?

MR. DILOFF: Your Honor, I was going to raise this exact question, because just as Mr. Billman has failed to appear and comply with Your Honor's order, so did Crysopt Corporation and the Batts Neck Companies, and Batts Neck Corporation, and I was going to ask Your Honor to grant similar relief as to them.

THE COURT: He was the officer that was asked to appear and appeared by no one else?

MR. DILLOFF: There is no one else to appear on behalf of them, and whether he is or not, no one showed up for any of those entities, just like Mr. Billman did not show up for himself. And they too have violated the order.

MR. DISCH: Your Honor, Mr. Billman was not designated as the representative of the company for those depositions. They were generic, asking that an employee be produced.

THE COURT: Read me what the notice of deposition says exactly, the notices to the companies.

MR. DISCH: Your Honor, we will re-produce the documents.

MR. DILLOFF: First of all, it is immaterial whether Mr. Billman intended or did not intend to show up on behalf of these corporations. The answer is that no one came.

The notice, "Plaintiffs hereby give notice that on November 7, 1989 they will take the deposition of First Batts Neck Company, with the address, beginning at 10:35 a.m. at the Circuit Court for Montgomery County. The deposition will continue from day-to-day until completed. And attached to the notice is request for subpoena duces tecum preceded by the sentence that says, quote, "The witness is to produce the following documents", and there is a list of the documents.

THE COURT: And no one showed up?

MR. DILLOFF: No one came.

MR. DISCH: There was no other employee available, Your Honor, and we had already produced the documents. There was nothing new to produce.

THE COURT: They are parties in this litigation and are required to show up for discovery, and whether or not they have someone available is their problem, as long as the party that serves the notice complies with the rules on time, et cetera, and the notices are appropriate. And if the notices are appropriate and there is a failure to comply, they are entitled to sanctions, and one of the sanctions is judgment against the failing party or parties.

So the same applies. The same ruling that I made against Mr. Billman applies to all companies.

MR. RICH: Your Honor, is there a notice against Crysopt Corporation?

MR. DILLOFF: Yes.

THE COURT: Anybody who got a notice and failed to respond and the notice was in the appropriate fashion.

MR. DILLOFF: Crysopt, Batts Neck Corporation and I forget how many Batts Neck Companies, that were to appear by a person and produce documents. All served on September 29, 1989 and all are in the record.

MR. DISCH: Your Honor, correct me if I am wrong, but when I read the motion for the sanctions and the request for constructive trust, the only person named was the recalcitrant, Mr. Billman. If in fact that is the first notice of deposition and the first time that someone from these corporations did not come and produce records, and if there is a real need for these records and that is not a sham proceeding, it is a very severe remedy to grant judgment against those defendants ipso facto after one non-appearance.

As I understand, the court's ruling pertained to Mr. Billman, not to those corporations.

THE COURT: What I said was that my ruling extends to all of those that failed to respond to discovery, and that is shown by notices, Mr. Billman and all of the other defendants that failed to respond, which would include Crysopt Corporation and the Batts Neck Companies.

MR. DILLOFF: Perhaps to make the record clear orally, although it is very clear in writing, the motion for sanctions is directed against each of the defendants. That is a quote from the fourth line, and attached to that are all the notices to all of the defendants in this case. So someone reading this has no doubt.

Number two, Your Honor's order in response to defendants', plural, motion, also in the file and addressed on behalf of all the corporations, was denied by you November 6, 1989, and you also ordered that defendants', plural, motion is denied and depositions, plural, are ordered to proceed as scheduled. So that anybody reading the record, the corporate defendants and anybody, would have no doubt as to anything.

MR. DISCH: I would briefly point out that I believe there is reason to differentiate between Mr. Billman and

the companies. We have already produced the documents and will stipulate to their authenticity and admissibility at trial.

THE COURT: The notice says appear, testify and produce documents. So they may have complied with the duces tecum part of it, but not to the part requiring testimony.

MR. DILLOFF: We do not concede for one minute that we have all the documents. We do not agree that all the documents were produced.

As a matter of fact one that was omitted in the papers, perhaps inadvertently forgotten today, were tax returns asked for in a hearing in front of Your Honor in which there was a contempt finding on that. So we did not get all the documents, and certainly got no bodies to ask questions of.

THE COURT: My ruling applies to all of the defendants. All of them having failed to comply with discovery, all of them being unable to defend as a result of that, and judgment being entered against them.

Now I am not sure, Mr. Rich, where that leaves you, because your main concern that was expressed in your filing was that you did not want the imposition of a constructive trust, and I have not imposed a constructive trust.

MR. RICH: No. You have gone beyond that, Your Honor.

THE COURT: Right.

If you want to be heard on intervention—

MR. RICH: Well, I do want to be heard as clearly as I can, even though I might not enunciate the s's like Mr. Dilloff, I can read the papers as well as anyone else, and I don't believe I am a fool, and I believe the thrust of his papers and argument pertained to Mr. Billman. And the thing that I will tell this court is that obviously the center of our attraction and our interest is the assets of Crysopt Corporation, tangible and intangible, which comes out to the same thing, the Batts Neck property.

We have a real interest in that, and that interest is such that it is apparent at this point and time in the record that we feel strongly that we should be able to intervene to protect that interest even through means of appealing the decision that the court has rendered today, which basically gives MDIF a method of circumventing what I think the status is, and I don't believe that the court has the ability to grant a judgment under these circumstances which can usurp a fact finding function merely because certain corporations did not appear at one deposition.

There was no showing, other than the argument of Mr. Dilloff today, there was no showing of any prejudice in this matter at all, and there was not even an attempt to show prejudice. If in fact there are documents that he wishes, there are people for him to depose, and a reason for him to do that, then those facts should be brought to this court's attention and we should have the ability to respond to what he is saying, that these documents were submitted, that he does have this information or that other information is essential to his case.

I think someone should be able to stand up in court and indicate or contest the assumption that MDIF is prejudiced by the lack of response to that deposition, or I think that we should have the ability to argue that equivalent information has been given, or that perhaps the ability to seek to cure the fact that someone did not appear to testify at the deposition.

As I understand, this was after three years, a number of years in court after a decision is overturned, knowing that we have a judgment against the property, this was a quick way to take priority. And I apologize for using the harsh terms, I don't mean to do that, but I believe that this is an end run on the purpose of the statute, and I think that there are no facts in the record to support the determination that this court has made today.

THE COURT: Well, there are certainly facts to support it, because there is failure to comply with discovery.

MR. RICH: But clearly there is no fact in evidence that shows prejudice, nothing. I have looked at those papers.

THE COURT: There is a failure to comply with discovery, but also a direct violation of a court order that said that these corporations and Mr. Billman were to appear for deposition.

MR. RICH: Your Honor, I don't contest the ruling, but the remedy—

THE COURT: And there was never any rejection of that order.

MR. RICH: I understand, Your Honor, but I still believe that for the court to impose the type of sanctions which severely impacts my client, my client goes from $347,000 creditor to someone who will probably end up with zero. And for the court to impose that sanction today without producing any evidence, I believe that this is an end run. Mr. Dilloff cannot and would not show prejudice.

I happen to believe that we have the ability to show that to the court, and if we are right and there is no prejudice, I believe that the remedy—

THE COURT: If you can show that to the court, it seems to me then there would be a question of whether you would be entitled to collect your judgment.

MR. RICH: If we can show that there is no prejudice to MDIF as a result of Crysopt Corporation not appearing at the deposition, then I don't believe MDIF is entitled to a judgment against Crysopt Corporation.

MR. DISCH: On the issue of Crysopt, Your Honor, I would ask the court to consider a judgment of the court in Ohio which pertains to Crysopt, Your Honor, and there was a proceeding there where MDIF under court order seized a number of Crysopt documents, so that is further evidence that they have been prejudiced because

they have seized two hundred boxes of Crysopt documents under a court order which we objected to, and I would like to make that judgment part of this court, Your Honor, as part of the evidence that there is reason to differentiate between Crysopt and Mr. Billman.

MR. DILLOFF: Your Honor, it seems to me that Mr. Billman has two lawyers all of a sudden.

Your Honor, I don't think—well, I know the law does not require us to show prejudice when a court order is violated. Someone reading this one day might have a different view, but, Your Honor, Mr. Billman would be our first witness if he were here. We are prejudiced because we are not able to figure out the basis for the defense and the basis set forth in the answer and the reason that they say this was a fair transaction, and the only one who can say that is Mr. Billman. He and his corporations got the property, so if there is any more crucial witness, I don't know who that is.

Let me address what I guess Mr. Harnett's counsel is saying, because I think it is important that the record and the court be clear on MDIF's position.

As I understand it, Mr. Harnett is here to intervene in this lawsuit. He was not said if he is intervening as a plaintiff or defendant. I assume as a plaintiff.

As we indicated, this lawsuit has been going on for over three years. It has been in the papers. It is true it was inactive while the suit in Montgomery County was going on. At one time MDIF sought to consolidate this lawsuit with the lawsuit in Montgomery County and that was opposed by Mr. Billman and the other defendants.

There can be no question that Mr. Harnett has been aware and has been following the litigation involving Tom Billman. He has counsel from two different law firms representing him throughout this matter. And for them to come in now at the eleventh hour and say that there is prejudice to them by a competing judgment credi-

tor also trying to get a judgment against Mr. Billman is nonsense, and the threshold issue pursuant to Rule 2-214 is the timeliness of the motion to intervene. If on no other basis the court finds that the motion is not timely, that is the end of Mr. Harnett.

But there is also an underlying reference to a statute, and I will put on the record MDIF's position with respect to the financial institution article 10-120 (B)1, which I assume is the statute that Mr. Rich is referring to, albeit not by name.

Here is the State's position with respect to a judgment in this case, which I think we just got. I am not sure any more. Mr. Harnett has a judgment against Mr. Billman—excuse me, against Crysopt. The statute provides, notwithstanding any other provision of law, in any action of the fund, number one, a judgment obtained by the fund shall have priority over any other judgment, or lien on the defendant's real or personal property.

Now what that means, whether Mr. Harnett likes it or not, the Maryland legislature said that if MDIF gets a judgment, before or after is not material, MDIF gets priority. A motion to intervene, if you put aside MDIF's status, this is an attempt to prevent another judgment creditor from ever getting a judgment against a debtor. This is a common situation. A lot of times when people are about to go into bankruptcy there are 15 judgments against them.

So all we are trying to do now is get a judgment. It seems to me that there is no basis to intervene at all with respect to that, and no prejudice to Mr. Harnett that someone else has a judgment against Crysopt also.

The part of the case to Mr. Harnett's detriment is that if MDIF gets a judgment, as opposed to another garden variety creditor, MDIF gets priority and that is what the legislature intended, and I agree a hundred percent with Mr. Rich that if we get a judgment in this

case against Crysopt we do have priority against Mr. Harnett and our judgment would be for an excess amount of his. He may get zero. So it is not an end run, it is a direct use of the statute for the benefit of MDIF.

THE COURT: Mr. Disch?

MR. DISCH: Your Honor, I point out that Mr. Harnett is not a general creditor. He holds a judgment, and this court and any other court would have to give credit to that judgment of a sister state.

THE COURT: Isn't that a different question?

It seems to me that the question of whether MDIF has priority or not is not really the question before me.

MR. RICH: I agree.

THE COURT: It may be that Mr. Rich can establish that they don't have that priority and they are entitled to payment of their $347,000 and change, but also he may not be able to establish that, but that comes later it seems to me, and what I am going to do is, even though it is the eleventh hour—and Mr. Dilloff is correct, everybody sort of sat back and waited until it got to this point—but what I am going to do is allow Mr. Harnett to—you will have a hearing on it—to establish that he is entitled to be paid and that MDIF does not have the priority that they are claiming that they have.

So I will allow intervention for that purpose which is really all you are worried about. Isn't that correct?

MR. RICH: That is correct.

THE COURT: So we will have another hearing, and what will happen is, since there isn't any questions about MDIF's ability to pay Mr. Harnett $347,000 or whatever it happens to be, if it turns out that he is correct, I will not require that money be held in escrow or anything of that nature. But that is an open question.

The open question is: Is Mr. Harnett entitled to his $347,000, i.e. does MDIF have priority in their judgment against all others, particularly Mr. Harnett.

MR. RICH: Your Honor, may I just add one element on that?

That is, I would like the ability to show you why a judgment should not be granted against Crysopt under the circumstances that we have discussed today?

THE COURT: No. My ruling is consistently against all of the defendants, and applies equally to all of them. I will give you the opportunity, which is what I think is fair under these circumstances, to, one, intervene, and your intervention will concern the issue of basically whether you get paid or not. That is the long and short of it. And I will determine whether MDIF—after the hearing and briefing of it, I will determine whether they have priority in the claim they have or whether they are wrong and you have a right to be paid.

So if you will prepare an order, Mr. Dilloff, in accordance with my ruling, I will sign it.

MR. DISCH: Your Honor, is there not going to be a damage hearing under the court's ruling, because if you are entering a judgment, I need to know whether or not the 30-day period for appeal begins to run.

Is there going to be a damage hearing or are you going to enter judgment for a monetary sum? Procedurally, I am just not clear.

THE COURT: Well, I am going to enter judgment in accordance with my rulings, and the only thing I am not going to enter judgment on is the priority of MDIF to all of the money, because that is an open question and they may not have that priority, and Mr. Rich may be able to convince me that they do not, and that his client is entitled to be paid.

MR. DISCH: Is it Your Honor's understanding then that there will be no final judgment until this matter is resolved. Otherwise we may have to take an appeal to protect ourselves.

We got in this trouble and—

THE COURT: How quickly can you brief the subject of priority, Mr. Rich?

MR. RICH: Two weeks.

MR. DILLOFF: Two days, Your Honor.

THE COURT: All right. I will give you two weeks to file anything you want, anything that either side wants to on the priority issue, and then we will have a hearing a week after that on it, and then I will enter findings of judgment, and the appeal time will run from the entry at that time. There is no point having a loose end. We will do it that way.

If you will prepare an order in accordance with my ruling, I will sign it.

Thank you all.

(CONCLUSION)

IN THE CIRCUIT COURT
FOR MONTGOMERY COUNTY

Civil Action No. 18009

STATE OF MARYLAND DEPOSIT
INSURANCE FUND CORPORATION, *et al.*,
Plaintiffs

v.

BATTS NECK CORPORATION, *et al.*,
Defendants

MEMORANDUM OF DEFENDANTS ON THE ISSUE OF THE MANNER IN WHICH THE CASE SHOULD PROCEED SUBSEQUENT TO THE COURT'S ENTRY OF A DEFAULT

Defendants Batts Neck Corporation, First through Sixth Batts Neck Companies, Crysopt Corporation and Tom J. Billman hereby file their memorandum on the issue on the manner in which the case should proceed subsequent to the Court's entry of a default.

Defendants believe that the Court would be committing a reversible error by entering defaults in this case. Defendants incorporate herein and renew all of their previously made objections to entry of defaults. By filing this memorandum, defendants are not waiving any of these objections.

Both due process of law and the Maryland Rules prohibit this Court from entering a default judgment for an arbitrary amount of damages, unsupported by any evidence of either the fact or amount of damages. *Geddes v. United Financial Group*, 559 F.2d 557, 560 (9th Cir.

1977) (evidence of damages required for default judgment); *Cokerlereece v. Moran*, 500 F. Supp. 487, 490-491 (N.D. Ga. 1980); *System Industries, Inc. v. Han*, 105 F.R.D. 72, 74-76 (E.D. Pa. 1985).

> (A) defaulting defendant is entitled to be heard at the hearing on the amount of damages.

6 Moore's *Federal Practice* § 55.07 at p. 55-44 (1988); *Alan Neuman Productions, Inc. v. Albright*, 862 F.2d 1388, 1390 (9th Cir. 1988). Defendants are entitled to a jury trial on the fact and the amount of damages, if any.

Accordingly, if this Court enters a default, the Court should transfer the case to Circuit Court for Montgomery County for a jury trial on the fact and amount of damages, if any.

CONCLUSION

For all of the foregoing reasons, defendants respectfully request that: (i) the Court not enter any defaults; or (ii) if the Court does enter defaults, then the Court should transfer the case to Circuit Court for Montgomery County for a jury trial on the issues of the fact and amount of damages, if any.

Respectfully submitted,

/s/ Robert M. Disch/acl
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ROBERT M. DISCH
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(202) 452-1074
Counsel for Defendants

Dated: February 27, 1990

IN THE CIRCUIT COURT
FOR MONTGOMERY COUNTY

Civil Action No. 18009

STATE OF MARYLAND DEPOSIT
INSURANCE FUND CORPORATION, *et al.*,
Plaintiffs

v.

BATTS NECK CORPORATION, *et al.*,
Defendants

DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR SANCTIONS [EXCERPT]

* * * *

It is impossible for Community, which has been repaid in full for all of its loans and advances, with interest, to have been damaged by these transactions in the sum of $2,878,407.00 represented by the surplus from the foreclosure sales on Parcels 1, 7, 8, and 11. MDIF and Community have not, and cannot, provide the Court with any evidence to justify entry of a default judgment for $2,878,407.00. Both due process of law and the Maryland rules prohibit this Court from entering a default judgment for an arbitrary amount of damages, unsupported by any evidence of either the fact or amount of damages. Maryland Rule 2-433(a)(3). *Geddes v. United Financial Group*, 559 F.2d 557, 560 (9th Cir. 1977) (evidence of damages required for default judgment); *Cocklereece v. Moran*, 500 F. Supp. 487, 490-491 (N.D. GA. 1980); *System Industries, Inc. v. Han*, 105 F.R.D. 72, 74-76 (E.D. PA 1985).

* * * *

IN THE CIRCUIT COURT
FOR MONTGOMERY COUNTY

Civil Action No. ———

STATE OF MARYLAND
DEPOSIT INSURANCE FUND
CORPORATION, as Receiver for
Community Savings & Loan, Inc.
114 E. Lexington Street
Baltimore, Maryland 21202

-and-

COMMUNITY SAVINGS & LOAN, INC.
6500 Rock Spring Drive
Bethesda, Maryland 20871

Plaintiffs,

v.

BATTS NECK CORPORATION
3101 Park Center Drive
Suite 1450
Alexandria, Virginia 22302

TOM J. BILLMAN
7717 Georgetown Pike
McLean, Virginia 22101

CLAYTON C. MCCUISTION
1208 Aldebaran Drive
McLean, Virginia 22102

BARBARA A. MCKINNEY
5218 Marvell Lane
Fairfax, Virginia 22032

JAMES B. DEERIN, JR.
203 Primrose Street
Chevy Chase, Maryland 20815

FIRST BATTS NECK COMPANY
3101 Park Center Drive
Suite 1450
Alexandria, Virginia 22302

SECOND BATTS NECK COMPANY
3101 Park Center Drive
Suite 1450
Alexandria, Virginia 22302

THIRD BATTS NECK COMPANY
3101 Park Center Drive
Suite 1450
Alexandria, Virginia 22302

FOURTH BATTS NECK COMPANY
3101 Park Center Drive
Suite 1450
Alexandria, Virginia 22302

FIFTH BATTS NECK COMPANY
3101 Park Center Drive
Suite 1450
Alexandria, Virginia 22302

SIXTH BATTS NECK COMPANY
3101 Park Center Drive
Suite 1450
Alexandria, Virginia 22302

EPICENTER CONSOLIDATED, LTD.
5113 Leesburg Pike
Suite 901
Falls Church, Virginia 22041

EPIC HOLDINGS, LTD.
5113 Leesburg Pike
Suite 901
Falls Church, Virginia 22041

-and-

CRYSOPT CORPORATION
3101 Park Center Drive
Suite 1450
Alexandria, Virginia 22302

Defendants.

COMPLAINT

Plaintiffs State of Maryland Deposit Insurance Fund Corporation, as Receiver of Community Savings & Loan, Inc. ("MDIF") and Community Savings & Loan, Inc. ("Community"), sue defendants Batts Neck Corporation ("BNC"), Tom J. Billman ("Billman"), Clayton C. McCuistion ("McCuistion"), Barbara A. McKinney ("McKinney"), James B. Deerin, Jr. ("Deerin"), First Batts Neck Company, Second Batts Neck Company, Third Batts Neck Company, Fourth Batts Neck Company, Fifth Batts Neck Company, Sixth Batts Neck Company (collectively "Batts Neck 1-6"), Epicenter Consolidated, Ltd. ("Epicenter"), EPIC Holdings, Ltd. ("Holdings"), and Crysopt Corporation ("Crysopt").

As set out more fully below, plaintiffs bring Counts I-V of this action against the defendants for causing Community to sell to Holdings the stock of BNC on terms that were unfair and unreasonable to Community. Plaintiffs bring Counts VI-X of this action against the defendants for causing Community to make loans to BNC and its individual subsidiaries that were commercially unreasonable, unfair and burdensome to Community. Plaintiffs bring Count XI for an accounting. Plaintiffs bring Counts XII-XIII of this action against BNC, Crysopt, and Batts Neck 1-6 for conspiring in the wrongful acts of the other defendants, for knowingly receiving the fruits and proceeds of those wrongful acts, and for conversion of the property of Community. Plaintiffs seek compensatory damages in excess of $7 million, punitive damages in excess of $14 million, and equitable relief.

JURISDICTION

1. This Court has jurisdiction of this suit under Section 1-501, Courts and Judicial Proceedings Article, Annotated Code of Maryland.

2. Venue lies in this Court pursuant to Section 6-202(11), Courts and Judicial Proceedings Article, Annotated Code of Maryland.

THE PARTIES

3. MDIF is an agency of the State of Maryland, established pursuant to Sections 10-101 through 10-119, Financial Institutions Article, Annotated Code of Maryland. Since May 18, 1985, MDIF has been the insurer of the savings accounts in Community, up to $100,000 per account for payments made prior to that date, and $100,000 per savings account holder for payments made after that date. On September 5, 1985, by order of this Court, it was appointed conservator for Community, and on April 8, 1986, by order of this Court, it was appointed receiver of Community. As Receiver, the powers otherwise resident in the directors, officers and shareholders of Community are vested in MDIF. MDIF brings this suit in the right of Community and on behalf of Community to obtain redress for the injury caused to Community as an entity, including the interests of its savings account holders and creditors in it as an entity (hereinafter all those interests are referred to collectively as "Community"), by the acts and omissions of the defendants complained of herein. MDIF reserves the right to file suit in any other capacity, including its capacity as insurer of savings accounts at Community.

4. Community is a savings and loan association chartered under the laws of the State of Maryland. All of the issued and outstanding common stock of Community is owned by Holdings. As of the appointment of the Receiver, Community also had outstanding some 27,000

savings accounts that represent payments from the public of approximately $339,000,000.

5. In this Complaint, Billman, McCuistion, McKinney and Deerin are referred to as the "individual controlling defendants," with respect to Community, and the individual controlling defendants plus Epicenter and Holdings are referred to as the "controlling defendants." The ultimate parent holding company of Community, whether Holdings or Epicenter, is referred to from time to time as the "Holding Company."

6. Billman, in concert with the other individual controlling defendants, controlled Community from October 1982 until at least February 1985 through his ownership of 80% of the stock of the parent holding company of Community. Billman owned 80% of the stock of Holdings (McCuistion owned the remaining 20%) from its formation in January 1982 until December 1984, when Billman and McCuistion contributed their stock in Holdings to another holding company, defendant Epicenter, which became Holdings' new parent. From and after February 1985 and through the appointment of the Conservator, Billman continued to exercise a controlling influence over the business and affairs of Community.

7. Billman owned 80% of the stock of Epicenter from December 1984 until February 1985, when he caused Epicenter to redeem his 80% stock interest for Epicenter assets with a book value of $31.8 million, including $14 million in cash. During the principal part of the time period pertinent to this Complaint, Billman was an officer or director of numerous companies in the Holding Company structure. Billman was one of three members of the Board of Directors of the Holding Company (McCuistion and McKinney were the other two) from January 1982 until August 1985. Billman was President of the Holding Company from January 1982 until February 1985. Billman was a member of the Board of Directors of Community from October 8, 1982, until August

1985 and was its Chairman for most of that time. Billman was also a member of the Board of Directors, and the principal individual controlling person, of Equity Programs Investment Corporation ("EPIC") from its formation in 1974 until August 1985.

8. McCuistion owned 20% of the stock of Holdings from its formation in January 1982 until December 1984, when McCuistion and Billman transferred their stock in Holdings to Epicenter. McCuistion owned 20% of the stock of Epicenter from that time until February 1985. He owned 100% of the voting stock from February 1985 until June 28, 1985, when certain employee stock options were exercised. Since that time, he has owned approximately 42% of the voting stock of Epicenter. McCuistion was one of three members of the Board of Directors of the Holding Company from January 1982 until Billman left the Board in August 1985; since that time, McCuistion and McKinney were (until McKinney's resignation after the conservatorship of Community) the sole members of that Board. McCuistion was also a Vice President and/or Treasurer of the Holding Company from January 1982 until February 1985, when he became President. He was a member of the Board of Directors of Community from October 8, 1982 until his resignation after the appointment of the Conservator, and during that time served continuously as the Board's Vice Chairman or Chairman. He was also Treasurer, Executive Vice President or President of Community throughout the same period. He also served as an officer and director of numerous other companies in the holding Company structure and was a vice president and the treasurer of BNC.

9. McKinney was a member of the Board of Directors and Vice President and/or Secretary of the Holding Company from January 1982 until her resignation after the conservatorship of Community. McKinney was an officer and/or director of numerous other companies in the Holding Company structure. She was a member of

the Executive Committee of Community's Board of Directors from August 3, 1983, until the appointment of the Conservator. McKinney was also a member of Community's Advisory Board of Directors and a vice president of Community. In addition, McKinney was a director of BNC. McKinney and Billman are the sole directors of Crysopt, which is the holding company for assets having a book value of $31.8 million that were transferred to Billman in February 1985 in redemption of his 80% stock interest in Epicenter.

10. Deerin was a member of Community's Board of Directors and of the Board's Executive Committee from October 8, 1982, until his resignation after the conservatorship, and was a Vice President, General Counsel and Secretary of Community throughout most of that period. Deerin, in addition, served as an officer and/or director of numerous other companies in the Holding Company structure and was a director of BNC.

11. BNC is a service corporation incorporated in Maryland on January 24, 1984. Since February 1985, it has been wholly owned by Crysopt. Prior to that it was owned by Community and by Holdings.

12. Batts Neck 1-6 were incorporated in Maryland on January 10, 1975. They are wholly owned subsidiaries of BNC.

13. Epicenter is a holding company incorporated in Delaware on December 6, 1984. Continuously since December 1984, it has owned all of the voting stock of Holdings and has indirectly owned all or substantially all of the voting stock of Community.

14. Holdings is a holding company incorporated in Delaware on January 29, 1982 (under another name). Holdings acquired indirect control of Community in October 1982 when it acquired (through Equity Acquisitions, Inc., a holding company incorporated by Holdings in Maryland for the purpose of acquiring Community) 85% of Community's voting stock. By mid-1983,

Holdings had acquired indirect ownership of more than 99% of Community's voting stock. Since February 1985, Holdings has directly owned 100% of the voting stock of Community.

15. Crysopt, a Delaware corporation wholly owned by Billman, is the holding company for the corporate assets acquired by Billman from Epicenter in February 1985, in connection with the redemption of the stock in Epicenter.

16. This Complaint is based on plaintiffs' investigations to date. After further investigation and discovery, plaintiffs respectfully reserve the right, with leave of Court if appropriate, to amend this Complaint to include additional claims and additional factual allegations.

FACTUAL BACKGROUND

17. BNC acquired Batts Neck 1-6, for the purpose of buying real estate on Kent Island, Queen Anne's County, Maryland. At that time BNC was a wholly owned subsidiary of Community. On February 8, 1984, BNC purchased 419 acres on Kent Island for $2.65 million on March 21, 1984, BNC purchased 267 acres for $533,500. These properties, known as Batts Neck Plantation and Adams Ellis Farms respectively, have substantial waterfront. BNC obtained the funds for these acquisitions from Community.

18. On July 12, 1984, the Executive Committee of the Board of Directors of Community (the "Committee") adopted a resolution that these properties were suitable for development and that they represented a secure investment. The Committee resolved to acquire adjacent waterfront property and to develop all the properties.

19. BNC made numerous improvements to the properties. On October 1, 1984, BNC also purchased 185 acres of adjacent land for $643,000. The source of the funds for the improvements and the real estate purchase was Community.

20. On October 5, 1984, four days after BNC's last real estate purchase, the Board of Directors of Community (the "Board"), under the control of the controlling defendants, adopted a resolution that Community should divest itself of BNC. The resolution provided for the exchange all of the issued and outstanding stock of BNC for 99% of the issued and outstanding stock of Epic Mortgage Servicing, Inc. ("EMSI"), which was owned by Holdings.

21. The Board, under the control of the controlling defendants, adopted a resolution on October 5, 1984, that the value of the real estate owned by BNC including capital improvements (the "Property") was $4,137,371. On information and belief, this valuation was based solely on the purchase price of the real estate and the actual cost of improvements, all of the funds for which had been advanced by Community. No appraisal of the fair market value of the Property was made in connection with this resolution.

22. On December 6, 1984, the Board, under the control of the controlling defendants, adopted a resolution that, since an exchange of BNC's stock for that of EMSI would have adverse tax consequences, Community should sell all the issued and outstanding stock of BNC to Holdings for the sum of $1,000. As part of the transaction, the Board adopted a resolution that BNC should restructure the first mortgage debt owed to Community so as to increase it to 75% of the value of the Property. The Board further resolved that BNC should repay all other outstanding debt to Community.

23. All funds used by BNC to acquire and improve the Property had been loaned to BNC by Community. Since after the sale BNC, now owned by Holdings, would continue to owe Community that amount (less any amounts repaid per the restructuring described in paragraph 22), the effect of the transaction was to sell BNC to Holdings for $1,000 over the cost of acquisition and

improvement of the Property, which was BNC's principal asset.

24. The sale was unfair and unreasonable to Community. No appraisal of the fair market value of the Property was made prior to the sale. The cost of original acquisition and improvement plus $1,000 was not fair market value because it did not reflect the value of the Property as assembled, developed, and appreciated.

25. On information and belief, the sale of BNC's stock to Holdings took place on or about December 28, 1984. The first mortgage debt was not restructured at that time, and no outstanding debt was repaid to Community at that time.

26. In January and February 1985, BNC paid Community some accumulated interest, but did not repay any of the principal on its loans.

27. In January and February 1985, the controlling defendants caused Community to make further unsecured advances to BNC in the amount of $539,506, which were used to make additional improvements to the Property.

28. In February 1985, Billman caused Epicenter to redeem his 80% stock interest. As part of that transaction, he acquired, through Crysopt, indirect ownership of BNC.

29. By May 1985, the total secured and unsecured loans made by Community to BNC for the acquisition and improvement of the Property exceeded $4,890,000. Some of the unsecured debt that BNC owed to Community was repaid in May 1985. Upon information and belief, the entire amount of the unsecured debt has never been repaid. Plaintiffs have been unable to determine from Community's books and records the exact amount lent by Community to BNC, or the exact amount of the secured and unsecured debt that has not been repaid. Despite requests the defendants have refused to provide this information to plaintiffs.

30. Prior to May 13, 1985,[1] the controlling defendants caused Community to issue restructured first mortgage loans to BNC. BNC divided the Property into 22 separate parcels and Community accepted 22 notes, each secured by a deed of trust for a different parcel, for an aggregate amount of $3,667,644. The obligors on the notes are BNC, and its individual subsidiaries which own certain portions of the Property, and recourse for failure to pay a note is solely to the parcel associated with that note.

31. The restructured notes were unfair and unreasonable to Community. No independent appraisal was made to ensure that the value of any given parcel fully secured the debt associated with it. In addition, the terms of the restructured notes and the deeds of trust are commercially unreasonable and have a number of provisions that are unfair and burdensome to Community.

32. The terms of the notes that are commercially unreasonable, unfair and burdensome to Community include the following:

(1) The interest rate is at the rate of 2¼% above the 90-day Treasury bill rate.

(2) The borrower has the right at any time to fix the interest rate for the entire period of the loan at the then current rate.

(3) The payments are for interest only until January 1, 1990.

(4) No default occurs under the notes until the borrower has failed to make two payments, Community has given notice, and the borrower fails to make payments for a further 90 days.

---

[1] The notes and deeds of trust for the restructured first mortgage debt bear the date December 28, 1984. The signatures on the deeds of trust were notarized on May 13, 1985.

(5) Community's recovery of attorney's fees in connection with an event of default is purported to be limited to $1,000.

(6) The notes are without recourse to the obligor.

(7) The notes give the borrower a right of setoff against Community that would allow the borrower to set off any debt or security of Community's that the borrower owns against the amount owing under the notes.

(8) All the loans are for thirty-year terms even though the parcels securing many of them are completely undeveloped.

33. The terms of the deeds of trust that are commercially unreasonable, unfair and burdensome to Community include the following:

(1) Each deed of trust allows for partial release of liens in return for a pro rata repayment. For example, the borrower may sell plots of 20 acres or more from any given parcel and repay Community at the pro rata rate of $3,020 an acre. The pro rata rate per acre remains constant even if the plot being sold has improvements or waterfront, and even if the plot remaining has neither or is landlocked.

(2) The loans purport to be fully assumable. The deeds of trust purport to deprive Community of the opportunity to prevent any and all subsequent purchasers from assuming the loans, or of the ability to require subsequent purchasers to submit financial data or proof of creditworthiness.

(3) Dissolution or liquidation of the borrower is not an event of default.

COUNT I

(Unfair Sale: Violation of Interested Director Provisions)

34. Plaintiffs reallege and incorporate herein by reference paragraphs 1-33 of the Complaint.

35. The individual controlling defendants were directors of Community, but also were directors of Holdings and/or had a material financial interest in Holdings as direct or indirect stockholders, directors, officers or employees of Holdings and/or its subsidiaries the time of the sale to Holdings of Community's stock in BNC.

36. The sale was not authorized, approved, or ratified in a manner provided for in Md. Corps. & Ass'ns Ann. § 2-419(b)(1), because the individual controlling directors so controlled the other directors that the sale was not authorized, approved or ratified by the affirmative vote of a majority of disinterested directors.

37. The sale was not fair and reasonable to Community because: (a) an independent appraisal of the fair market value of the Property was not made prior to sale; and (b) the fair market value of the assembled, developed and appreciated property was far in excess of the cost of acquisition and improvement plus $1,000, which was the only consideration provided Community under the sale agreement.

38. By reason of the above, the sale to Holdings of Community's stock in BNC is voidable under Md. Corps. & Ass'ns Ann. § 2-419(a).

COUNT II

(Unfair Sale: Breach of Duty of Loyalty)

39. Plaintiffs reallege and incorporate herein by reference paragraphs 1 through 38 of the Complaint.

40. The sale to Holdings of Community's stock in BNC was unfair and unreasonable to Community because: (a) an independent appraisal of the fair market value of the Property was not made prior to sale; and (b) the fair market value of the assembled, developed and appreciated property was far in excess of the cost of acquisition and improvement plus $1,000, which was the

only consideration provided Community under the sale agreement.

41. The sale was unfairly advantageous to Holdings, in which the individual controlling defendants had a material financial interest as direct or indirect stockholders, directors, officers and/or employees. (or as Holdings itself)

42. In permitting, voting for and/or causing the sale to Holdings of Community's stock in BNC, the controlling defendants did not act in good faith and in a manner they reasonably believed to be in the best interests of Community.

43. The acts of the individual controlling defendants in permitting, voting for and/or causing the sale to Holdings of Community's stock in BNC violated their fiduciary duty of loyalty as directors of Community under Md. Corps. & Ass'ns Ann. § 2-405.1, and as officers of Community under the common law of Maryland.

44. The acts of Epicenter and Holdings in permitting and causing the sale to Holdings of Community's stock in BNC violated their fiduciary duty of loyalty as controlling shareholders of Community under the common law of Maryland.

45. By reason of the foregoing, Community was injured in an amount to be proven at trial.

COUNT III

(Unfair Sale: Breach of Duty of Care)

46. Plaintiffs reallege and incorporate herein by reference paragraphs 1-45 of the Complaint.

47. In permitting, voting for and/or causing the sale to Holdings of Community's stock in BNC without requiring an independent appraisal of the fair market value of the Property, and for consideration that was unfair and unreasonable to Community, the individual

controlling defendants failed to perform their duties as officers and directors of Community with the care that an ordinarily prudent person in a like position would use under similar circumstances. By reason of the foregoing, the individual controlling defendants violated their duty of care as directors of Community under Md. Corps. & Ass'ns Ann. § 2-405.1(a)(3), and as officers of Community under the common law of Maryland.

48. In permitting and causing the sale to Holdings of Community's stock in BNC, without requiring an independent appraisal of the fair market value of the Property, and for consideration that was unfair and unreasonable to Community, Epicenter and Holdings violated their duty of care as controlling shareholders of Community under the common law of Maryland.

49. By reason of the above, Community was injured in an amount to be proven at trial.

COUNT IV

(Unfair Sale: Fraudulent Conveyance)

50. Plaintiffs reallege and incorporate herein by reference paragraphs 1 through 33 of the Complaint.

51. Community's sale of the stock of BNC to Holdings was unlawful under Sections 15-205 and 206, Commercial Law Article, Annotated Code of Maryland, in that Community did not receive fair consideration for the stock of BNC, and (as to § 15-205) after the sale Community had an unreasonably small amount of capital for the business in which it was engaged, and (as to § 15-206) one or more of the controlling defendants knew at the time of the sale of the stock (and Community was charged with this knowledge) that Community would incur debts beyond its ability to pay as they matured.

52. By permitting, voting for and/or causing the sale of the BNC stock and/or receiving the proceeds of the

sale of the BNC stock, the controlling defendants injured Community in an amount to be proven at trial.

COUNT V

(Unfair Sale: Usurpation of Corporate Opportunity)

53. Plaintiffs reallege and incorporate herein by reference paragraphs 1 through 49 of the Complaint.

54. During 1984, Community financed the acquisition and improvement of the Property which it wholly owned through its Batts Neck subsidiaries.

55. Community had a right, property interest and expectancy in the opportunity to obtain value from the Property in excess of Community's costs, including such elements of the Property's fair market value as the enhanced value derived from assembly, development and appreciation of the Property.

56. By permitting, voting for and/or causing the sale to Holdings of Community's stock in BNC, the controlling defendants appropriated to themselves—as direct or indirect shareholders, directors, officers and/or employees of Holdings (or as Holdings itself)—a valuable asset of Community in violation of their fiduciary duty to Community.

57. By reason of the above, Community was injured in an amount to be proven at trial.

COUNT VI

(Unfair Terms: Violation of Interested Director Provisions)

58. Plaintiffs reallege and incorporate herein by reference paragraphs 1 through 33 of the Complaint.

59. The individual controlling defendants were directors of Community, but also were directors of Holdings and/or had a material financial interest in Holdings as

direct or indirect shareholders, directors, officers or employees of Holdings and/or its subsidiaries during the period in which the first mortgage debt owed by BNC to Community was restructured. To the extent any of the restructuring of the mortgage debt occurred after Holdings transferred its interest in BNC to Crysopt, during that period defendants Billman and McKinney were directors of Community, but also were directors of and had a material financial interest in Crysopt.

60. The restructured mortgage loans were not authorized, approved, or ratified in a manner provided for in Md. Corps. & Ass'ns Ann. § 2-419(b)(1) because: (a) many of the commercially unreasonable terms of the restructured notes and deeds were not disclosed to and were not presented for a vote of the distinterested directors of Community; and (b) many of the terms of the restructuring itself were authorized, approved or ratified by the affirmative vote of a majority of disinterested directors because the individual controlling directors controlled the other directors.

61. The restructured mortgage loans were not fair and reasonable to Community because: (a) an independent appraisal was not made to ensure that the value of any of the 22 separate parcels fully secured the debt associated with it; and (b) the terms of the notes and deeds of trust are commercially unreasonable, unfair and burdensome as detailed in paragraphs 32-33.

62. By reason of the above, the first mortgage loans are voidable under Md. Corps. & Ass'ns Ann. § 2-419(a).

COUNT VII

(Unfair Terms: Breach of Duty of Loyalty)

63. Plaintiffs reallege and incorporate herein by reference paragraphs 1 through 33 and 58-62 of the Complaint.

64. The restructured mortgage loans made by Community to BNC were unfair and unreasonable to Com-

munity because: (a) an independent appraisal was not made to ensure that the value of any of the 22 separate parcels fully secured the debt associated with it; and (b) the terms of the notes and deeds of trust are commercially unreasonable, unfair and burdensome as detailed in paragraphs 32-33.

65. The restructured mortgage loans were unfairly advantageous to Holdings and Crysopt, in which the individual controlling defendants had a material financial interest as direct or indirect shareholders, directors, officers and/or employees.

66. In permitting, voting for and/or causing the issuance of the restructured mortgage loans, the controlling defendants did not act in good faith and in a manner they reasonably believed to be in the best interests of Community.

67. The acts of the individual controlling defendants in voting for and/or causing the issuance of the restructured mortgage loans violated their fiduciary duty of loyalty as directors of Community under Section 2-405.1, and as officers of Community under the common law of Maryland.

68. The acts of Epicenter and Holdings in permitting and causing the issuance of the restructured mortgage loans violated their fiduciary duty of loyalty as controlling shareholders of Community under the common law of Maryland.

69. By reason of the above, Community was injured in an amount to be proven at trial.

COUNT VIII

(Unfair Terms: Breach of Duty of Care)

70. Plaintiffs reallege and incorporate herein by reference paragraphs 1 through 33 and 58-69 of the Complaint.

71. In permitting, voting for and/or causing the issuance of the restructured mortgage loans, without requiring an independent appraisal of the 22 separate parcels, and on terms that were commercially unreasonable, unfair and burdensome to Community, the individual controlling defendants failed to perform their duties as officers and directors of Community with the care that an ordinarily prudent person in a like position would use under similar circumstances. By reason of the foregoing, the individual controlling defendants violated their duty of care as directors of Community under Md. Corps. & Ass'ns Ann. § 2-405.1(a)(3), and as officers of Community under the common law of Maryland.

72. In permitting and causing Community to make restructured mortgage loans to BNC, without requiring an independent appraisal of the 22 separate parcels, and on terms that were unfair, unreasonable and burdensome to Community, Epicenter and Holdings violated their duty of care as controlling shareholders of Community under the common law of Maryland.

73. By reason of the above, Community was injured in an amount to be proven at trial.

COUNT IX

(Unfair Terms: Fraud and Misrepresentation)

74. Plaintiffs reallege and incorporate herein by reference paragraphs 1 through 33 of the Complaint.

75. The controlling defendants owed duties of loyalty and care to Community as officers, directors and/or controlling shareholders under Md. Corps. & Ass'ns Ann. § 2-405.1 and the common law of Maryland.

76. When the controlling defendants sought the approval of the Board for the sale of the stock of BNC and for the issuance of restructured mortgage loans, the controlling defendants omitted to inform the Board of

the commercially unreasonable, unfair and burdensome provisions that the notes and deeds of trust would contain. In so doing, the controlling defendants misrepresented material facts to the Board.

77. The controlling defendants knew that they were misrepresenting material facts to the Board, knew the Board would rely on those facts, intended the Board to rely on those facts, and did so for the purpose of defrauding Community. The Board had a right to rely upon the representations of the controlling defendants and did so rely to the detriment of Community.

78. By reason of the above, Community was injured in an amount to be proven at trial, and is entitled to recover actual and punitive damages.

COUNT X

(Unfair Terms: Negligent Misrepresentation)

79. Plaintiffs reallege and incorporate herein by reference paragraphs 1 through 33 of the Complaint.

80. The controlling defendants owed duties of loyalty and care to Community as officers, directors and/or controlling shareholders under Md. Corps. & Ass'ns Ann. § 2-405.1 and the common law of Maryland.

81. When the controlling defendants sought the approval of the Board for the sale of the stock of BNC and for the issuance of restructured mortgage loans, the controlling defendants omitted to inform the Board of the commercially unreasonable, unfair and burdensome provisions that the notes and deeds of trust would contain. In so doing, the controlling defendants misrepresented material facts to the Board.

82. The controlling defendants reasonably should have known that they were misrepresenting material facts and that the Board would rely on those facts. The Board had

a right to rely upon the representations of the controlling defendants and did so rely to the detriment of Community.

83. By reason of the above, Community was injured in an amount to be proven at trial.

COUNT XI

(For an Accounting and Repayment)

84. Plaintiffs reallege and incorporate herein by reference paragraphs 1 through 33 of the Complaint.

85. Upon information and belief, the entire amount of the unsecured debt owed by BNC to Community has never been repaid.

86. Plaintiffs have been unable to determine from Community's books and records the exact amount loaned by Community to BNC, or the exact amount of the secured and unsecured debt that has not been repaid. Despite requests the defendants have refused to provide this information to plaintiffs.

87. In failing to repay the entire amount of the unsecured debt owed by BNC to Community, BNC violated the terms of the Board resolution of December 6, 1984, and the contract implied therein from BNC's acceptance of Community's loans.

88. In permitting and/or causing the failure of BNC to repay the entire amount of the unsecured debt, and in failing to record in the books and records of Community the exact amount loaned by Community to BNC and the exact amount of the secured and unsecured debt that has not been repaid, the controlling defendants violated their duties of loyalty and care to Community as officers, directors and/or controlling shareholders under Md. Corps. & Ass'ns Ann. § 2-405.1 and the common law of Maryland.

89. By reason of the above, Community is entitled to an accounting of the exact amount loaned by Community to BNC, an accounting of the exact amount of the se-

cured and unsecured debt that has not been repaid, and repayment with interest of the amount of the unsecured debt that has not been repaid.

COUNT XII

(Co-conspirators/Means and Instrumentalities: Crysopt, BNC, Batts Neck 1-6)

90. Plaintiffs reallege and incorporate herein by reference paragraphs 1 through 89 of the Complaint.

91. Defendants Crysopt, BNC, and Batts Neck 1-6 were among the means and instrumentalities by which the controlling defendants engaged in the course of conduct complained of in Counts I-XI; knowingly participated in the statutory and common law violations, violations of duty and torts complained of therein; and knowingly received the fruits and proceeds of those unlawful acts including (as to Crysopt) the stock of BNC and (as to BNC and Batts Neck 1-6) the restructured first mortgage loans.

92. By reason of the above, Crysopt, BNC, and Batts Neck 1-6 are liable with the controlling defendants for the entirety of the damage caused to Community by reason of the acts complained of in Counts I-XI.

COUNT XIII

(Conversion: Crysopt, BNC and Batts Neck 1-6)

93. Plaintiffs reallege and incorporate herein by reference paragraphs 1 through 89 of the Complaint.

94. By reason of the wrongful acts complained of in Counts I-XI, Community is entitled to rescission of the sale of BNC stock, recission of the loans it made to BNC, and return of the BNC stock, title to the Property, and the loan funds.

95. Defendants Crysopt, BNC, and Batts Neck 1-6 were among the means and instrumentalities by which the

controlling defendants engaged in the course of conduct complained of in Counts I-XI; knowingly participated in the statutory and common law violations, violations of duty and torts complained of therein; and knowingly received the fruits and proceeds of those unlawful acts including (as to Crysopt) the stock of BNC and (as to BNC and Batts Neck 1-6) the restructured first mortgage loans.

96. By reason of the above, Crysopt is not a bona fide purchaser for value of the stock of BNC, and BNC and Batts Neck 1-6 are not bona fide purchasers for value of the loan funds.

97. Crysopt has exercised and continues to exercise dominion and control over the stock of BNC which rightfully belongs to Community, and BNC and Batts Neck 1-6 have exercised and continue to exercise dominion and control over the loan funds which rightfully belong to Community.

98. By reason of the above, Crysopt, BNC and Batts Neck 1-6 are liable for conversion of the property of Community in an amount to be proven at trial in excess of $7 million, and for punitive damages in excess of $14 million.

CONCLUSION AND DEMAND AND PRAYER FOR RELIEF

WHEREFORE, plaintiffs demand and pray:

(a) With respect to Counts I-V, and XII-XIII, judgment against the defendants, jointly and severally, for the entirety of the damages sustained by Community as a result of the wrongful acts of the defendants. Such damages include compensation to Community equal to the differences between the price Community received for the stock of BNC and the fair market value of the stock of BNC, plus fair market interest from the date of the sale, in an amount to be proven at trial.

(b) With respect to Count V a constructive trust for the benefit of Community placed on the proceeds of any sale of the stock of BNC or the Property.

(c) With respect to Count I, and as an alternative to (a) and (b) above, rescission of the sale and an injunction ordering the return to Community of the stock of BNC and the title to the Property.

(d) With respect to Counts VI-X and XII-XIII, judgment against the defendants, jointly and severally, for the entirety of the damages sustained by Community as a result of wrongful acts of the defendants, and reformation of the terms of the mortgage loans between BNC and its individual subsidiaries and Community to terms that are commercially reasonable. Damages include compensation to Community equal to the difference between the value of mortgage loans with commercially reasonable terms and the value of the actual mortgage loans, including payment to Community of fair market interest, from the dates of the loans to the dates of their reformation.

(e) With respect to Count VI, and as an alternative to (d), rescission of the mortgage loans, and judgment against the defendants, jointly and severally, for the full amount of the loans, plus fair market interest from the dates of the loans, in an amount to be proven at trial.

(f) With respect to Counts IX and XII-XIII, judgment against the defendants, jointly and severally, for punitive damages of $14 million.

(g) With respect to Count XI, an accounting of the exact amount loaned by Community to BNC, an accounting of the exact amount of the secured and unsecured debt that has not been repaid, and repayment with fair market interest of the amount of the unsecured debt that has not been repaid.

(h) For attorneys' fees, costs and disbursements incurred in connection herewith by plaintiffs; and

(i) For such other, further and different relief as may appear just and proper.

Respectfully submitted,

ARNOLD & PORTER

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Dated: September 26, 1986